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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~130~~ 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 11, 1905.

(19,932.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1905.

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1 THE UNITED STATES OF AMERICA:

To The National Enameling and Stamping Company & George Wettengel, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Conrad Wecker is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable G. A. Finkelnburg, Judge of the Circuit Court of the United States for the Eastern District of Missouri, this 15th day of September in the year of our Lord one thousand nine hundred and five (1905).

G. A. FINKELNBURG,
United States District Judge for the Eastern
District of Missouri.

Service of above acknowledged Sept. 15, '05.
NATIONAL ENAMELING & STAMPING CO.,
GEORGE WETTENGEL,
SEDDON & HOLLAND,
WISE & McNULTY, Their Attorneys.

1½ [Endorsed:] No. 5068 United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. Conrad Wecker vs. The National Enameling Co. Harry Schenk and George Wettengel Citation. Filed Sep. 15 1905. James R. Gray, Clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the March Term, 1905, thereof, between Conrad Wecker, Plaintiff and The National Enameling & Stamping Co., and George Wethengel Defendants a manifest error hath happened, to the great damage of the said Conrad Wecker as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 15th day of October 1905, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of September in the year of our Lord one thousand nine hundred and five (1905).

Issued at office in the City of St. Louis, with the seal of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court, Missouri, Eastern Division of the Eastern Judicial District. }

JAMES R. GRAY,
Clerk Circuit Court United States, Eastern Division
of the Eastern Judicial District of Missouri.
By —— ——, Deputy.

Allowed by
G. A. FINKELNBURG, Judge.

3 [Endorsed:] No. 5068 United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. Conrad Wecker vs. The National Enameling & Stamping Co. *et al.* Writ of Error to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. Filed Sep. 15 1905. James R. Gray, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of St. Louis, this 16" day of September A. D. 1905.

{ Seal of the United States Circuit Court, Missouri, Eastern Division of the Eastern Judicial District. }

JAMES R. GRAY,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Be it remembered, that heretofore, to-wit: on the 19th day of September, A. D. 1904, there was filed in the office of the clerk of the circuit court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, in a certain cause wherein Conrad Wecker is Plaintiff and National Enameling & Stamping Company, a corporation, Harry Schenk, and George Wettengel, are Defendants, a Transcript from the Circuit Court City of St. Louis, which said Transcript is in words and figures as follows, to-wit:—

(Transcript.)

STATE OF MISSOURI,
City of St. Louis, } ss:

Be it remembered, that heretofore, to-wit: on the 15th day of April, A. D. 1904, there was filed in the office of the Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, a petition in cause No. 32452, Series A., of the causes in said Court, wherein Conrad Wecker, is plaintiff and the National Enameling Company, *et al.*, are defendants.

The said petition is in words and figures as follows, to-wit:

STATE OF MISSOURI,
City of St. Louis, } ss:

In the Circuit Court, City of St. Louis, State of Missouri, June Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY, a Corporation; Harry Schenk, and George Wettengel, Defendants.

Plaintiff for his cause of action, states: That the said National Enameling & Stamping Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and that said Harry Schenk and George Wettengel are residents of the city of St. Louis, State of Missouri. That at and before the time of the commission of the grievances hereinafter mentioned, said plaintiff was employed by said defendant corporation to fire, fill, stir, empty and attend to certain large metal pots used by said defendant corporation for melting grease and lubricant matter at the plant operated by it at Granite City, county of Madison, State of Illinois. The said grease and lubricant matter was delivered by said defendant corporation to said plaintiff in solid form in barrels of great weight, to-wit: about six hundred (600) pounds each. In

the course of his said employment it was plaintiff's duty, after removing the barrels from around said grease and lubricant matter, to hoist the same to the top surface of the furnace structure, into which said pots were set, and to dump said grease and lubricant matter into the said pots. The said defendant corporation wholly and negligently failed to perform the duties, which as master it owed to said plaintiff, while engaged in its employment as aforesaid.

6 Defendant's said negligence consisted in this, to-wit: that it negligently allowed said pots, about which plaintiff was employed as aforesaid, and which were constantly filled with hot and boiling grease and lubricant matter, to remain open and exposed and negligently failed to provide for the said pots any covering, railing, or any devise or means of any character whatsoever whereby to reasonably protect plaintiff, its servant, from accidentally slipping or falling into the same while engaged in the performance of his aforesaid duties. And said defendant corporation negligently constructed said furnace structure in which said pots were set, on and about which said plaintiff was employed by said defendant corporation; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and said defendant corporation negligently gave to plaintiff such instructions as to the manner of performing his said duties as unreasonably endangered the safety of said plaintiff in carrying out the same.

As a result of the said premises and of said defendant corporation's said negligence plaintiff, while engaged in the performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid open, unguarded and unprotected pots containing hot and boiling grease and lubricant matter; and received great and painful burns and injuries the nature and extent of which are hereinafter more particularly described.

Plaintiff further says that the said Harry Schenk and the said George Wettengel were employed by said defendant corporation and

7 charged by it with the superintendence and oversight of said plaintiff in the performance of his aforesaid duties and the said Schenk and the said Wettengel were employed by said defendant corporation and charged by it with the duty of superintending and properly planning the construction of the said furnace structure into which the said pots were set; and further charged by said defendant corporation with the duty of providing for said pots reasonably safe and suitable covering, railing, or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's aforesaid duties; and further charged by said defendant corporation with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and further charged by said defendant corporation with the duty of properly instructing said plaintiff as to the manner of performing

said plaintiff's duties. Nevertheless said defendants, Harry Schenk and George Wettengel, negligently planned and directed the construction of the said furnace structure into which the said pots were set, so that same was not a reasonably safe place for plaintiff to work in the performance of his aforesaid duties; and negligently failed to provide for the said pots reasonably safe and suitable covers or railing or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's aforesaid duties; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and negligently gave to plaintiff such instructions as to the manner of performing plaintiff's said duties as unreasonably endangered the safety of said plaintiff in carrying out the same. As a result of the said premises and of the said negligence of said defendants, said plaintiff,
8 while engaged in performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid unguarded and unprotected pots containing hot and boiling grease and lubricant matter and received great and painful burns and injuries, the nature and extent of which are hereinafter more particularly described. The injuries which plaintiff received as aforesaid, on or about November 12, 1902, and which hereinbefore he has alleged were the result of the aforesaid negligence of said defendant corporation and of said defendants Harry Schenk and George Wettengel, were the result of the joint negligence of said defendants and each act of negligence which plaintiff has hereinbefore charged against each of said defendants was the joint act of all of said defendants.

The injuries which plaintiff received as aforesaid as the result of the joint negligence of said defendants are as follows, to-wit: severe serious, painful and permanent burns and injuries of both hands and arms and of both feet and legs. As a result of said injuries plaintiff has suffered, still suffers, and will hereafter suffer great pain and agony of mind and body; and as a result of said injuries has necessarily expended moneys and incurred liabilities in a large amount for medicines and doctor's fees, to-wit: One Thousand Dollars, ($1000.00); and as a result of said injuries it has been necessary for plaintiff, for a long period of time, to-wit: seventeen months (17), to have the constant care, attention, and nursing of his wife and other members of his family, and the reasonable value of said services in nursing and caring for plaintiff is Five Hundred Dollars ($500.00). Plaintiff's daily earnings prior to said injuries
9 were Two and 25 100 Dollars ($2 25) per day. Since receiving said injuries and as a result thereof, plaintiff has been unable to do any work or labor or to earn anything in any way; wherefore has lost salary and wages to a large amount, to-wit: Nine Hundred and Eighteen Dollars ($918.00); and as a result of said injuries plaintiff's future earning capacity will be permanently diminished and probably entirely destroyed. All of which has damaged plain-

tiff to a large amount, to-wit: Fifteen Thousand ($15,000.00), for which amount he prays judgment together with his costs in this behalf expended.

R. T. BROWNRIGG &
W. L. MASON,
Att'ys for Plaintiff.

Upon the filing of the said petition, a writ of summons for the defendants, was issued by the Clerk of said Court, to the sheriff of the City of St. Louis.

The said writ, together with the returns of service thereon endorsed, are respectively in words and figures as follows, to-wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to summon National Enameling & Stamping Company a corporation; Harry Schenk and George Wettengel, to appear before the Judges of our Circuit Court, on the first day of the next term thereof, to be held in the City of St. Louis, at the Court House in said City, on the first Monday of June next, then and there to answer the complaint of Conrad Wecker as set forth in the annexed petition; and have you then and there this writ.

Witness, William H. Hauschulte, Clerk of our said Court,
10 with the seal thereof hereto affixed, at office in the City of St. Louis, this 19th day of April in the year of our Lord nineteen hundred and four.

[SEAL.] WM. H. HAUSCHULTE, Clerk.

Served this writ in the City of St. Louis, Missouri, on the within named defendant The National Enameling and Stamping Company (a corporation), this 20th day of April 1904, by delivering a copy of the writ and petition as furnished by the Clerk to H. F. Niedringhaus Cashier of the said defendant Corporation, he being in said defendant's usual business office and in charge thereof.

The President or other Chief Officer of said defendant could not be found in the City of St. Louis at the time of service.

JOSEPH F. DICKMANN, Sheriff,
By J. ROMANSKY, Deputy.

I further executed this writ in the City of St. Louis, this 2nd day of May 1904, by leaving a copy of the writ as furnished by the Clerk for George Wittengel a defendant herein, at his usual place of abode with a person of his family over the age of 15 years.

JOSEPH F. DICKMANN, Sheriff,
By EDW. PHELAN, Deputy.

After due and diligent search the within named defendant Harry Schenk cannot be found in the *in the* City of St. Louis, Mo.

JOSEPH F. DICKMANN, Sheriff.
J. ROMANSKY, Deputy.

Fee $2.50.

11 And afterwards, to-wit: at the June term, 1904, of said Court, the following proceedings were had in said cause, to-wit:

MONDAY, June 6th, 1904.

CONRAD WECKER
vs.
NATIONAL ENAMELING CO. (and Other Causes). } 32452. Motion for Security for Costs Filed.

MONDAY, June 6th, 1904.

CONRAD WECKER
vs.
NATIONAL ENAMELING AND STAMPING COMPANY, HARRY Schenk, and George Wettengel. } 32452*a*.

Now at this day comes the defendant by attorney, and files a petition duly verified by affidavit, praying for the removal of this cause to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and also files herein its bond, conditioned according to law, in the sum of Five Hundred Dollars, and the Court having heard and duly considered the said petition, doth approve said bond, and doth order, that the Clerk of this Court, do forthwith certify to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a transcript of the record and proceedings in this cause as fully as the same remain on file and of record in this Court.

The said petition and bond for removal, are respectively in the words and figures following, to-wit:

12 STATE OF MISSOURI, } *ss*:
City of St. Louis, }

In the Circuit Court, City of St. Louis, June Term, A. D. 1904.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY, a Corporation; Harry Schenk, and George Wettengel, Defendants.

Petition on behalf of the National Enameling & Stamping Company, a corporation, for the removal of this cause to the circuit court of the United States in and for the eastern division of the eastern district of the State of Missouri.

To the honorable the circuit court of the city of St. Louis, State of Missouri:

Your petitioner, The National Enameling & Stamping Company, a corporation, limiting its appearance herein for the purpose of filing this petition, and not admitting the jurisdiction of this Court, over it and appearing for no other purpose whatever, respectfully repre-

sents to the Court that it is one of the defendants in the above entitled suit, and your petitioner shows unto the Court:

That it is one of the defendants in the above entitled suit;

That the matter and amount in dispute in said suit exceeds, exclusive of interests and costs, the sum or value of two thousand dollars ($2,000.00);

That the said suit is of a civil nature at common law, of which the Circuit Court of the United States had original jurisdiction;

That said suit has been brought and is now pending in this Court, and has not yet been tried, nor has the time within which this defendant, your petitioner, is required by the laws of the State
13 of Missouri, or any rule of this Honorable Court to answer or plead to the complaint of the plaintiff elapsed;

That said plaintiff herein is now and was at the time of the bringing of this suit and ever since has been a citizen of the City of St. Louis and of the State of Missouri.

That your petitioner, the National Enameling & Stamping Company, was at the time of the bringing of this suit, is now and *eversince* has been a citizen of the State of New Jersey, in which State it was then and *eversince* has been, and is now duly incorporated, and that it was not at the time of the commencement of this suit and never has been and is not now incorporated in the State of Missouri, nor a citizen thereof;

That Harry Schenk, one of the co-defendants in this suit, has not been served with process herein; that he was at the time of the commencement of this suit, ever since has been and is now a citizen of the State of Illinois, residing in Granite City Illinois;

That the said co-defendant, George Wettengel, is now, was at the time of the commencement of this suit and ever since has been a citizen of the State of Missouri.

That there is in said suit a controversy wholly between citizens of different States, and which can wholly be determined between them, to-wit: between your petitioner and the said plaintiff, and that said separate controversy is wholly between your said petitioner and the said plaintiff, and the said co-defendants of your petitioner are not interested in the determination thereof or necessary parties thereto, and said separate controversy is this: That your petitioner at the time of the alleged accident to the said Conrad Wecker was the employer of the said Wecker, and the owner of the factory wherein he was working, as appears by the said petition on file, and the issue and controversy whether this defendant negligently allowed
14 the pots about which the plaintiff was employed to remain open and exposed, and whether your petitioner negligently failed to provide for said pots any covering, railing or other means to reasonably protect the plaintiff from slipping or falling into the same while he was performing his duties, and whether your petitioner negligently constructed the said furnace structure upon which the said pots were set, and whether your petitioner negligently failed to provide proper and reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating the grease and lubricant matter to the top surface of the furnace structure, and whether your

petitioner negligently gave the plaintiff such instructions as to the manner of performing his duties, and unreasonably endangering the plaintiff in carrying out the same, which controversies and matters must be wholly determined between your petitioner and the said plaintiff, and in which its said co-defendants, Schenk and Wettengel, can have no interest.

And your petitioner further shows unto your Honor that there is a separate controversy stated on the face of the said petition which is wholly between the said plaintiff and your petitioner, and may be wholly determined between them without its co-defendants being parties thereto, and that said separate controversy is this: that the said co-defendants, as servants of your said petitioner, may not be joined in this suit against them for the matters and things alleged against them in the plaintiff's petition, and that as to the matters and things alleged against your petitioner in said petition, it appears from the face of the petition that these matters are matters wholly to be determined between the plaintiff and your petitioner, and which may not be determined between the plaintiff and its co-defendants.

And your petitioner further avers that there is in said cause the further separable controversy, namely:—whether the said plaintiff assumes the risk of being injured while in his employment, and that this controversy is wholly between the said plaintiff and your petitioner, and its co-defendants have and can have no interest therein, and the same may be wholly determined between the plaintiff and your petitioner.

And your petitioner further avers that the said Harry Schenk and the said George Wettengel were not at the time of the accident to the said plaintiff, or prior thereto, charged with the superintendancy and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the said furnace structure, into which the pots were set, and were not charged by the defendant with the duty of providing for the pots reasonably safe and suitable covering, railing, or other device to protect plaintiff from slipping or falling into the same, and were not charged with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of the said furnace structure, and were not charged by your petitioner with the duty of properly instructing the plaintiff as to the manner of performing said plaintiff's duties, and it is not true that the said defendants, Schenk and Wettengel or either of them negligently failed to carry out the said alleged duties mentioned in plaintiff's petition or any of them; and it appears from the face of the plaintiff's said petition that the said plaintiff was not injured by reason of the failure of the said Schenk and Wettengel to perform any of the said duties alleged against them, but was injured from other and different grounds.

And your petitioner further avers that the said Harry Schenk being a citizen of the State of Illinois, that as to him and your petitioner, this suit is removable, and should be removed to the

United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as herein prayed, and that as to the said George Wettengel, your petitioner charges
16 and states the fact to be that he is improperly and fraudulently joined herein with your petitioner by the plaintiff in this suit, for the sole purpose of fraudulently and improperly preventing or attempting to prevent this petitioner from removing this cause to the United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as prayed for herein, and for no other purpose, and that the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was in no manner charged with the performance of any of the duties which it is alleged he should have performed in the said petition, and the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was not in or about the place where the said plaintiff was injured at the time of the said injury; that he in no manner was in control or superintendent; that it was not his duty to plan the construction of the said furnace or to provide any covering, railing or other divice in or about said pots, or to provide reasonably safe and sufficient hoisting apparatus for plaintiff's use, but that the said plaintiff with this knowledge joined the said Wettengel herein solely to prevent the removal of this cause, and not in good faith.

And your petitioner further states that the petition herein states no cause of action against said Wettengel.

And your petitioner shows that by reason of the premises it desires and is entitled to have the said suit removed from the Circuit Court of the City of St. Louis, Missouri into the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri.

17 And your petitioner offers herewith a bond with good and sufficient surety, for its entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, on the first day of its next term, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to provide no further order herein, except to make an order for the removal of this cause to the said Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, and to accept the said surety and bond, and to cause the record herein to be removed to the said Circuit Court of the United States, as herein prayed for.

NATIONAL ENAMELING AND
STAMPING COMPANY,
By WISE & McNULTY AND
SEDDON & HOLLAND, Its Attorneys.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Merritt *M.* Hayden, being duly sworn, on his oath says, that he is the agent in this behalf of the National Enameling and Stamping Company, and that he makes this affidavit as such for and on behalf of said Company.

Affiant says that he has read the foregoing petition and knows its contents, and that the same is true in substance and in fact of affiant's own knowledge, except as to that part of said petition which shows that the said plaintiff and his attorneys fraudulently and improperly joined George Wettengel with the said National
18 Enameling and Stamping Company, for the purpose of preventing the removal of this cause, and as to this averment affiant says that he believes the same to be true, and that he has investigated the matters connected with this accident.

MERITT *M.* HAYDEN.

Subscribed and sworn to before me this 3rd day of June, A. D. 1904.

My commission expires on the 21st day of October, A. D. 1907.

GEORGE T. WITZEL,
[SEAL.] Notary Public.

Know all men by these presents: That the National Enameling & Stamping Company, a corporation organized under the laws of New Jersey, as principal, and T. K. Niedringhaus of St. Louis, Mo., as surety, are held and firmly bound unto Conrad Wecker, of the City of St. Louis and State of Missouri, in the penal sum of Five Hundred Dollars ($500.00), for the payment whereof, well and truly to be made unto the said Conrad Wecker, his heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly, severally, firmly by these presents;

Yet upon these conditions: Whereas, the said National Enameling & Stamping Company, having petitioned the Circuit Court of the City of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein Conrad Wecker is plaintiff, and The National Enameling & Stamping Company, Harry Schenk and George Wettengel, are defendants, to the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri:

Now, if the said National Enameling & Stamping Company, said petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in this suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said Court shall hold
19 that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

In witness whereof, the said National Enameling & Stamping Company, as principal, has caused these presents to be duly exe-

cuted, and its corporate seal hereto affixed this 31st day of May, A. D. 1904, and the said surety has caused these presents to be duly executed this 31, day of May, A. D. 1904.

NATIONAL ENAMELING & STAMPING CO.
T. F. CALESMAN, V. Pres. [SEAL.]
T. K. NIEDRINGHAUS, Surety.

Attest:
[SEAL.] A. M. STEINHARDT,
Ass't Secretary.

Approved in open court, this 6th day of June 1904.
WM. H. HAUSCHULTE, Clerk.

STATE OF MISSOURI, } ss:
City of St. Louis, }

T. K. Niedringhaus being first duly sworn on his oath says that he is a resident of the City of St. Louis and State of Missouri; that he has real estate in the said City of St. Louis of the value of more than $2000.00 over and above all exemptions and encumbrance of every kind and nature whatsoever and that said property for more than $2000.00 is subject to execution.

T. K. NIEDRINGHAUS.

Subscribed and sworn to before me this 4th day of June, 1904.
My term as Notary Public will expire the 14th day of Feb. 1908
[SEAL.] JESSE B. COZZENS,
Notary Public, City of St. Louis, State of Missouri.

20 STATE OF MISSOURI, } ss:
City of St. Louis, }

I, William H. Hauschulte, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify the above and foregoing, contains a true, full and complete transcript of the record and proceedings in the above entitled cause, including the petition, affidavit and bond for removal and the order of removal, as fully as the same remain of record and on file in my office (except the motion for security for costs which is hereto attached.)

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said Court, at office in the City of St. Louis, this the 8th day of September, 1904.

WM. H. HAUSCHULTE,
Clerk, Circuit Court.

And thereupon, to-wit: on said 19th day of September, A. D. 1904, there was also filed in said cause an Answer of Defendant National Enameling & Stamping Company, which said Answer is in words and figures as follows, to-wit:

(Answer.)

In the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY ET AL., Defendants.

Now comes the National Enameling & Stamping Company, one of the defendants in the above cause and for its separate an-
21 swer to the petition of plaintiff filed herein denies each and every allegation in said petition contained.

Further answering said defendant states that whatever injuries, if any, were sustained by the plaintiff on the occasion mentioned in his petition were caused by the negligence of plaintiff directly contributing thereto.

And for a further defense said defendant states that all the details of the surroundings amid which plaintiff was working on the occasion mentioned in his petition were open and obvious and were known to plaintiff, or by the exercise of ordinary care would have been known to plaintiff, and that whatever dangers, if any, existed in working amid said surroundings were open and obvious and were known to plaintiff, or by the exercise of ordinary care would have been known to plaintiff, and that plaintiff assumed whatever risk, if any, there was in working amid said surroundings on said occasion.

Wherefore having fully answered said defendant prays to be hence dismissed with its costs.

WISE McNULTY &
SEDDON & HOLLAND,
Attorneys for said Defendant.

And thereupon, to-wit: on said 19th day of September, A. D. 1904, there was filed also in said cause a Demurrer of Defendant George Wettengel, which said Demurrer is in words and figures as follows, to-wit:

(Demurrer of Def't George Wettengel.)

In the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING CO. ET AL., Defendants.

Now comes George Wettengel, one of the defendants in the
22 above cause and demurs to the petition of plaintiff filed herein, and for ground of his demurrer assigns that said petition does not state a cause of action against this defendant.

WISE McNULTY &
SEDDON & HOLLAND,
Attorneys for Defendant, Geo. Wettengel.

And afterwards, to-wit: on the 15th day of October, A. D. 1904, there was filed in said cause a Motion to Remand, which said Motion to Remand is in words and figures as follows, to-wit:

(Motion to Remand.)

In the Circuit Court of the U. S. for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1904.

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING & STAMPING CO., a Corporation; Harry Schenk and George Wettengel, Defendants. } No. —.

Plaintiff's Motion to Remand the Above Entitled Cause to the Circuit Court for the City of St. Louis, State of Missouri.

Now comes the plaintiff in the above entitled cause and moves that the court remand same to the Circuit Court for the City of St. Louis, State of Missouri, because

1. There is not in said cause a controversy wholly between citizens of different States and which can wholly be determined between them.

2. There is not in said cause a separate controversy which is wholly between the said plaintiff and the said defendant, The National Enameling & Stamping Co., and which may be wholly determined between them without the said co-defendants being parties thereto.

23 3. The said defendant, George Wettengel, was not improperly and fraudulently joined as defendant herein for the purpose of fraudulently and improperly preventing, or attempting to prevent, the removal of this cause to this court.

R. T. BROWNRIGG &
W. L. MASON,
Attorneys for Plaintiff.

And afterwards, to-wit: on the 9th day of November, A. D. 1904, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Motion to Remand Submitted.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING CO. ET AL., Defendants. } 5068.

The motion to remand heretofore filed herein is this day argued by counsel and submitted to the Court—3 affidavits filed.

And afterwards, to-wit: on the 3rd day of December, A. D. 1904, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Motion to Remand Denied.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING CO. ET AL., Defendants. } 5068.

The Court having fully considered the motion to remand heretofore submitted herein doth order that the said motion be denied.

And afterwards, to-wit: on the 22nd day of December, A. D. 1904, there was filed in said cause a Bill of Exceptions to Court's Ruling on Motion to Remand, which said Term Bill of Exceptions
24 is in words and figures as follows, to-wit:—

(Bill of Exceptions.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for the said Division of said District, September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING AND STAMPING CO., a Corporation; George Wettengel *et al.*, Defendants. } No. —.

Be it remembered that on the 15" day of Oct., 1904, and during the September term of said court, the plaintiff in the above entitled cause filed a motion to remand the cause to the Circuit Court of the City of St. Louis, State of Missouri, which said motion is in words and figures as follows, to-wit:

In the Circuit Court of the U. S. for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING Co., a Corporation; Harry Schenk and George Wettengel, Defendants. } No. 5068.

Plaintiff's Motion to Remand the Above Entitled Cause to the Circuit Court for the City of St. Louis, State of Missouri.

Now comes the plaintiff in the above entitled cause and moves that the court remand same to the Circuit Court for the
25 City of St. Louis, State of Missouri, because

1. There is not in said cause a controversy wholly between citizens of different states and which can wholly be determined between them.

2. There is not in said cause a separate controversy which is wholly between the said plaintiff and the said defendant, the

National Enameling & Stamping Co., and which may be wholly determined between them without the said co-defendants being parties thereto.

3. The said defendant, George Wettengel, was not improperly and fraudulently joined as defendants herein for the purpose of fraudulently and improperly preventing, or attempting to prevent, the removal of this cause to this court:

R. T. BROWNRIGG &
W. L. MASON,
Attorneys for Plaintiff.

In support of and resistance to said motion the following affidavits were filed:

(Affidavit of Conrad Wecker.)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

STATE OF MISSOURI, } ss:
City of St. Louis, }

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING & STAMPING CO., Defendant. } No. 5068.

Conrad Wecker, being duly sworn on his oath, says: That he was in the employment of the defendant, The National Enameling & Stamping Co., prior and up to the time of the construction of
26 the furnace structure mentioned in plaintiff's petition filed herein; and that George Eisenmayer was, prior and up to the time of the construction of said structure, in the employment of said defendant company, and was charged with the general supervision of the work and business of the said company at the place at which plaintiff was employed and at which he received his injuries, as set forth in his petition filed herein. That just prior to the construction of the said furnace structure the plaintiff heard the said Eisenmayer direct the said defendant George Wettengel to prepare plans for a furnace structure to be erected upon the spot whereupon was shortly afterwards erected the furnace structure upon which plaintiff was at work when he received the injuries set forth in his petition; that plaintiff at the time he filed his petition herein believed, and still believes, that the said defendant George Wettengel planned and directed the construction of the said furnace structure as set forth in plaintiff's petition filed herein.

CONRAD WECKER.

Sworn to and subscribed before me this 9th day of November, 1904.

My term expires on the 14th day of January, 1908.

[SEAL.] CLAUD D. HALL,
Notary Public, City of St. Louis, State of Mo.

(Affidavit of George Eisemayer.)

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING CO., Defendant.

27 George Eisemayer being first duly sworn on his oath says that on the 12th day of November, 1902, and for some years previous thereto, he was in the employ of the National Enameling and Stamping Co., in the capacity of Chief Engineer, that as such chief engineer affiant was charged, among other things, with the duty of seeing to the repairs of the apparatus used by the defendant and also planning any new apparatus that was about to be adopted. Affiant further states that during said period it was customary for the National Enameling and Stamping Co. to do all or most of its own work, in connection with repairs and construction, and affiant states that in order to get proper execution of such work of repairs and construction George Wettengel was employed in the office of defendant as a draftsman, and that several other persons were employed in the said office as draftsmen. And affiant further states that the sole work of said George Wettengel, during the period above mentioned, was that of draftsman and that said George Wettengel had nothing to do with selecting plans or approving plans, but that his sole work was to take plans and ideas given to him, and to make the necessary drawings for the use of the mechanics.

And affiant further states that said George Wettengel, during said period, had no authority to employ or discharge men, or no authority whatever to superintend the work of any of the men, nor authority to give instructions to any of the men as to how they should do their work, and further affiant saith not.

GEO. F. EISENMAYER.

Sworn and subscribed to before me this 26th day of October, 1904.

My term expires on the 14 Day of February, 1908.

[SEAL.] JESSE B. COZZENS,
Notary Public, City of St. Louis, State of Missouri.

(Affidavit of George Wettengel.)

28 STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff, }
vs.
NATIONAL ENAMELING & STAMPING COMPANY, Defendant. }

George Wettengel being first duly sworn on his oath says that he is 28 years of age, and is one of the defendants in the above suit. Affiant states that at the time mentioned in plaintiff's petition, to-wit, the 12th day of November, 1902, and for about ten years previous thereto, affiant had been employed by the National Enameling and Stamping Company as a draftsman; that at the time of said accident, and for some years previous thereto, the affiant had no other duties in the said employment, except to act as a draftsman; that all his work was done in the office of said company, and that he had no work whatever outside of the office, and was not thrown in contact with the employes outside of the office, or with the plaintiff, and was charged with no duty whatever of superintendence in connection with the work of the outside employes, or with the plaintiff, at the time of said accident, or for several years previous thereto.

Affiant further states that he was not charged, at the time of said accident, or for several years previous thereto, with any duty of designing or planning the apparatus that was used in the defendant's plant, but that the designing of all apparatus, and the selection of apparatus was made by other persons, and that the sole duty of affiant, at the time of said accident, and for several years previous thereto, was to attend to the mechanical work of drafting
29 which was based exclusively upon the ideas and plans adopted by other persons. And affiant further states that he had no discretion whatever as to what sort of apparatus should be used in any part of defendant's plant; and with reference to the particular pots mentioned in plaintiff's petition, and into one of which plaintiff claims he fell, affiant states that he had nothing to do with planning said pots, and had no right whatever to determine what sort of pots should be used, or whether a railing should be used, in connection with the same, or what sort of hoisting apparatus should be used.

And affiant further states that he is charged with no duty by defendant, in connection with the plaintiff as to how and when he should do his work, but that affiant had no authority whatever to give any instructions. In short, affiant states that his position was a clerical position in the office, and his duties were confined to the actual making of drawings to enable mechanics to do construction work upon the basis of plans adopted by other persons tha affiant

in the employ of defendant. And affiant further states that there is no ground whatever for the suit of Conrad Wecker against affiant, and that in truth and in fact there is no possible ground upon which any charge can be made against this affiant in connection with the accident set out in plaintiff's petition, which occurred on November, 12, 1902.

Affiant further states that at the time of the said accident, and for several years previous thereto, he did not know the plaintiff, Conrad Wecker, by name, and did not know what sort of work he was doing, or in what part of the defendant's plant he was engaged. And affiant further states that he was never thrown in contact with the said Conrad Wecker in his work and was charged with no duty whatever of superintending the work of said Conrad Wecker or instructing the said Conrad Wecker how to do his work, and further affiant saith not.

GEO. WETTENGEL.

Sworn and subscribed to before me this 22nd day of October, 1904. My term expires Aug. 4th, 1908.

[SEAL.] JOHN M. DOERMA,
Notary Public, City of St. Louis,
State of Missouri.

(Bill of Exceptions—Continued.)

That thereafter, on the 4th day of December and on one of the days of the September term, 1904, of said court, the said motion, having been heard by said court, and after due consideration thereof by the court, was, on said 4th day of December, 1904, during said September term of said court, overruled by said court in an order in words and figures as follows, to-wit:

It is ordered that the motion to remand is denied.

That thereupon, said plaintiff then and there excepted to the action of the court denying said motion.

That the said exceptions to the action of the court in denying said motion may be saved and made part of the record, plaintiff hereby tenders his bill of exceptions and prays that the same may be signed, sealed and filed in this cause, which is accordingly done this 22nd day of December, and during said September term of said court.

ELMER B. ADAMS,
Judge of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

O. K.
SEDDON & HOLLAND.

And afterwards, to-wit: on the 26th day of January, A. D. 1905, there were had in said cause the following proceedings and same appear of record as follows, to-wit:

(Demurrer Submitted.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING COMPANY ET AL., Defendants. } 5068.

The demurrer to the petition heretofore filed herein is this day submitted to the Court.

And afterwards, to-wit: on the 15th day of February, A. D. 1905, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Demurrer Sustained.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING & STAMPING CO. ET AL., Defendants. } 5068.

The Court having fully considered the demurrer to the petition by defendant George Wettengel doth order that said demurrer be sustained.

And afterwards, to-wit: on the 13th day of April, A. D. 1905, the following further proceedings were had and appear of record as follows, to-wit:

(Dismissal and Judgment.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING & STAMPING COMPANY, a Corporation; Harry Schenk, and George Wettengel, Defendants. } 5068.

Now on this, the 13" day of April, 1905, come the parties by their attorneys, and thereupon the said plaintiff, by his at-
32 torney, states to the Court that he elects to stand upon his motion to remand the said cause to the Circuit Court for the City of St. Louis, State of Missouri, which motion has been heretofore overruled by the Court, and that the said plaintiff refuses to recognize the jurisdiction of the Court, or to proceed with the prosecution of the said cause in this Court; thereupon on motion of defendant it is ordered that said cause be dismissed.

It is therefore considered by the court that the plaintiff Conrad Wecker take nothing by his suit in this behalf, and that the defendants National Enameling & Stamping Company, a Corporation, Harry Schenk, and George Wettengel, go hence without day and recover of the said plaintiff their costs and charges herein expended and have execution therefor.

And afterwards, to-wit: on the 17th day of April, A. D. 1905, there was filed in said cause a Motion in Arrest which said Motion is in words and figures as follows, to-wit:—

(Motion in Arrest.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judici } ss:
District of Missouri,

In the Circuit Court of the United States in and for said Division of said District, September Term, 1904.

CONRAD WECKER, Plaintiff,
v.
THE NATIONAL ENAMELING AND STAMPING COMPANY, a Corporation; George Wettengel *et al.*, Defendants. } No. 5068.

Comes now the plaintiff in the above entitled cause and moves the court to arrest the judgment rendered herein upon the grounds and for the reasons following:

33 1st. Because the court erred in overruling plaintiff's motion to remand the said cause to the Circuit Court of the City of St. Louis, State of Missouri;

2nd. Because upon the entire record the judgment is erroneous.

BROWNRIGG & MASON,
Att'ys for Plaintiff.

Received Copy April 17th 1905.

SEDDON & HOLLAND.
J. H. A.

And afterwards, to-wit: on the 18th day of April, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:

(Motion in Arrest Overruled.)

CONRAD WECKER, Plaintiff,
v.
NATIONAL ENAMELING COMPANY ET AL., Defendants. } 5068.

The Court having fully considered the motion in arrest of judgment this day submitted herein, doth order that the said motion be overruled.

And afterwards, to-wit: on the 26th day of April, A. D. 1905, there was filed in said cause a Certificate of the Judge, which said Certificate is in words and figures as follows, to-wit:

(Certificate of the Judge.)

In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING COMPANY and GEORGE WETTENGEL, Defendants.

34 I, Elmer B. Adams, Judge of said court hereby certify that the only question decided by the court in this cause is that the joining of defendant Wettengel as co-defendant with defendant National Enameling & Stamping Company, was palpably groundless and fictitious, and done for the purpose of unlawfully depriving the defendant Stamping Company of its right to remove the cause to this court for trial. For this reason the motion to remand the cause to the State Court was denied. In deciding this motion the the court took into consideration, not only the complaint and petition for removal, but the affidavits filed in support and opposition to the motion to remand. The plaintiff refused to submit to the jurisdiction of this court and suffered a dismissal of the suit for want of prosecution. The question is whether this court had jurisdiction of the action.

Witness my hand this 26th day of April A. D. 1905.

ELMER B. ADAMS, Judge.

And afterwards, to-wit: on the 15th day of September, A. D. 1905, the following further proceedings were had and appear of record in said cause, as follows, to-wit:

(Appeal granted.)

CONRAD WECKER, Plaintiff,
v.
THE NATIONAL ENAMELING AND STAMPING COMPANY ET AL., Defendants. } 5068.

Now comes plaintiff by attorney and files an assignment of errors and a petition for a writ of error to the United States Supreme Court from the judgment rendered herein; thereupon it is ordered that said writ of error be granted and that plaintiff give a cost bond in the sum of Five hundred dollars ($500.00); thereupon said plaintiff presents a bond in the sum of five hundred dollars
35 ($500.00); thereupon said plaintiff presents a bond in the sum of five hundred dollars which is approved by the Court and filed, and a citation, citing and admonishing said defendants to be and appear at the said United States Supreme Court within thirty days from this date is signed by the Judge.

Which said Assignments of Errors, Petition for Writ of Error and Bond are in words and figures as follows, to-wit:

(Assignment of Errors.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for said Division of said District, September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING AND STAMPING COMPANY, a Corporation, George Wettengel *et al.*, Defendants. } No. 5068.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers exist.

First. The court erred in denying the plaintiff's motion to remand the cause to the Circuit Court for the City of St. Louis, State of Missouri.

Second. The court erred in holding that plaintiff in his petition does not state a joint cause of action against the said defendants, The National Enameling and Stamping Company and George Wettengel.

36 Third. The court erred in holding that plaintiff's complaint herein discloses but one cause of action and that against the defendant corporation.

Fourth. The court erred in conceiving that there is in said suit any controversy wholly between citizens of different States and which could wholly be determined between them.

Fifth. The court erred in sustaining the demurrer of the defendant, George Wettengel.

Sixth. The court erred in dismissing plaintiff's petition and entering judgment in favor of defendants.

Wherefore, plaintiff prays that said judgment may be reversed.

BROWNRIGG & MASON,
Attorneys for Plaintiff.

(Petition for Writ of Error.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for said Division of said District. September Term, 1904.

CONRAD WECKER, Plaintiff,
vs.
THE NATIONAL ENAMELING AND STAMPING COMPANY, a Corporation, George Wettengel *et al.*, Defendants. } No. 5068.

Now comes Conrad Wecker, plaintiff herein, and says: That on the 13th day of April, 1905, the Circuit Court for the Eastern Divi-

sion of the Eastern Judicial District of Missouri entered judg-
37 ment herein in favor of the defendant and against this plaintiff, in which and in the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for correction of the errors so complained of, and that a transcript of the record proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

BROWNRIGG & MASON,
Attorneys for Plaintiff.

(Bond.)

Know all men by these presents, That we, Conrad Wecker as principal and Arnold Kulage as surety are held and firmly bound unto The National Enamelling & Stamping Co., and George Wettengel in the full and just sum of five hundred dollars to be paid to the said National Enameling & Stamping Co., and George Wettengel their heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this fifteenth day of September in the year of our Lord one thousand nine hundred and five.

Whereas, lately at the March term A. D. 1905, of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between Conrad Wecker plaintiff and The National Enameling & Stamping Co., & George Wettengel defendants judgment was rendered
38 against Conrad Wecker and the said Conrad Wecker has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said National Enammeling & Stamping Co. and George Wettengel citing and admonishing them to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the date of said Citation.

Now the condition of the above obligation is such, That if the said Conrad Wecker shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

CONRAD WECKER. [SEAL.]
ARNOLD KULAGE. [SEAL.]

Sealed and delivered in presence of—
FRED S. HALL.
M. T. DONOVAN.

Approved by—
G. A. FINKELNBURG, Judge.

(Opinion on Motion to Remand.)

39 In the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

CONRAD WECKER, Plaintiff,
vs.
NATIONAL ENAMELING & STAMPING CO., HARRY SCHENK and George Wettengel, Defendants. } No. 5068.

ADAMS, District Judge:

This action was instituted by the plaintiff in one of the Circuit Courts of the State. He charged in his complaint that he was employed by the defendant corporation to work about certain large metal pots used for the melting of grease and lubricant matter; that the corporation failed to use proper care to furnish a reasonably safe place for him to work, or reasonably safe appliances with which he should work. The negligence is particularized as follows: That the corporation failed to provide the metallic pots with any covering, railing or other device to protect its servants from liability to fall into them. It is observed from this general statement, that the negligence charged against the corporation is a failure to perform that positive duty which the law imposes upon a master to provide a reasonably safe place and reasonably safe appliances for use of its servants.

After setting forth the facts already referred to the plaintiff avers: that the individual defendant Wettengel was employed by the corporation and charged with the duty of planning and constructing the bank of metallic pots, and with the duty of seeing that they were safely covered, railed off or otherwise protected, so that
40 the employés might not be unreasonably exposed to danger; that as a result of what complainant denominates the joint negligence of both the corporation and Wettengel, he was precipitated into one of these metallic pots and injured.

In due course the defendant corporation filed its motion to remove the cause from the State Court to this court, alleging in its petition that the plaintiff was a citizen of the State of Missouri; that the defendant corporation was a citizen of the State of New Jersey, and that defendant Wettengel was a citizen of the State of Missouri, and alleging further that the defendant Wettengel was fraudulently joined as a defendant for the purpose of improperly preventing the removal of the cause to this court, and that there is a separable controversy within the meaning of the Judiciary Act of 1887, as amended by the Act of 1888, wholly between the plaintiff and the defendant corporation, which can be fully determined as between them, and with respect to which the defendant Wettengel has no concern.

Upon the filing of such a petition in the State Court the cause was ordered removed to this court. The plaintiff now comes and

moves to remand the cause to the State Court on the grounds as alleged; (1) That Wettengel was not fraudulently joined as a defendant for the purpose of preventing removal, and (2) That no separable controversy between the plaintiff and the defendant corporation is disclosed by the complainant.

Plaintiff contends that the defendant corporation and the defendant Wettengel are properly joined, because they are charged to be joint tort feasors, and because both are liable to the plaintiff for the injury which he has sustained. The defendant contends that there is no liability stated as against defendant Wettengel, that the only liability stated in the pleading is against the corporation, and
41 that as a result thereof the case was properly removed.

I have, as is well known by the bar, frequently ruled: that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right of removal exists and cannot be defeated by any showing *aliunde* the complaint itself, that the two were not jointly liable. Such rulings have always been predecated upon the averments of the complaint as they there appear. But where a complaint discloses the fact there can be no joint liability, and that an allegation of that sort is groundless and fictitious, then such an allegation cannot deprive the non-resident defendant of his right to remove the cause. Referring again to the averments of the complaint, it appears that the charge is: that the defendant corporation failed to perform its duty in the matter of providing a reasonably safe place for the plaintiff to work, and that the defendant Wettengel was the agent of the corporation in the matter of making this provision. In other words the defendant Wettengel is charged in the complaint to have been acting within the scope of his duty as agent in the performance of one of the fundamental and positive duties of the master. He is charged with negligence merely—is not charged with wantonness, recklessness or other active misconduct. Does such a complaint disclose any cause of action at all against the agent? I think not. The only charge against him in legal effect is; that he failed to use reasonable care in doing the work of his principal. Such failure is a proper definition of negligence. Negligence is negative in character. It is the omission to perform some duty.
42 Milwaukee R. R. Co. vs. Ames, 91 U. S. 489. It implies non-feasance as distinguished from mis-feasance. It certainly does not imply wantonness or recklessness or express malice. For acts of mere negligence without wantonness or express malice, the servant incurs no liability to a third person, the master alone is liable. Story on Agency, 9th Ed. 308, 309; Kelly vs. C. & A. Railway Co., 122 Fed. 286; Davenport vs. Southern Railway Co., 124 Fed. 983, Shaffer v. Union Brick Co. 128 Fed. 97, Hilms vs. N. P. Ry. Co. 120 Fed. 389, and cases therein cited.

The complaint itself shows too much for the plaintiff's purposes. It clearly states him out of court as to defendant Wettengel. In the light of the averments of the complaint just referred to, the general broad statement of the legal conclusion that plaintiff was injured

by the joint negligence of both the corporation and Wettengel, can have no effect.

The views already expressed are in harmony with the opinion of the Supreme Court of the United States in Chesapeake & Ohio Railway Company vs. Dixon, 179 U. S. 131. Certain expressions are there employed which give color to the contention of the plaintiff in this case. The court held in that case that the right of removal did not exist. In other words it held that the charge of concurrent negligence on the part of the railroad company and the engineer, might, so far as the petition disclosed, exist. The court there says: "The negligence may have consisted in that the train was run at too great speed; and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurring negligence is charged the controversy is *is* not separable."

43 It seems obvious from the foregoing language that if the plaintiff in the Dixon case had charged that the only act of negligence was the running of the train at an excessive rate of speed, and that the company acted in the matter of operating the train solely by and through its agent the engineer, a different result would have been reached. As I understand that case, the conclusion reached, was based upon the facts appearing in the complaint, that a joint act of negligence was charged and no showing was otherwise made in the complaint negativing the joint and concurrent act of negligence.

I am therefore disposed to apply the doctrine of the case of Bank of Arapahoe vs. Bradley, 72 Fed. 867, 872, and to hold that the joining of the individual defendant with the corporation in this case, is probably groundless and fictitious, and obviously intended to unlawfully deprive the defendant of the right given him to remove its cause into this court for trial. There is disclosed in the complaint but one cause of action and that is against the corporation.

The motion to remand is denied.

(Opinion on Motion in Arrest.)

ADAMS, *J.*:

The opinion rendered heretofore on the motion to remand made no allusion to the affidavits filed, tending to show the fictitious and fraudulent joining of defendant Wettengel, and it is sufficient now to say that they inevitably show that the inferences drawn from the allegations of the petition are correct.

44 These affidavits may be considered on the question involved in the motion. Enstofson v. Chicago R. I. & P. Ry. Co. 128 Fed. 85.

45 UNITED STATES OF AMERICA, Eastern Division of the Eastern Judicial District of Missouri, } ss:

I, James R. Gray, Clerk of the Circuit Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a full, true and complete transcript of the record and proceedings in said Case No. 5068 of Conrad Wecker Plaintiff, vs. National Enameling and Stamping Company (a corporation), Harry Schenk and George Wettengel defendants together with all things concerning the same as fully as the same remain on file and of record in said case in my office, and that the original citation and writ of error are herewith attached and returned.

In witness whereof, I hereunto subscribe my name and affix the seal of said Court, at office, in the City of St. Louis, in the Eastern Division of said District, this 16″ day of September in the year of our Lord, nineteen hundred and five.

{ Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri. }

JAMES R. GRAY,
Clerk of Said Court,
By —— ——, Deputy.

[Endorsed:] No. 5068 United States Circuit Court Eastern Division of the Eastern Judicial District of Missouri. Conrad Wecker Plaintiff against National Enameling and Stamping Co., Harry Schenk and George Wettengel Transcript to the Supreme Court of the United States.

Endorsed on cover: File No. 19,932. E. Missouri C. C. U. S. Term No. 430. Conrad Wecker, Plaintiff in Error, vs. The National Enameling and Stamping Company and George Wettengel. Filed October 11th, 1905. File No. 19,932.

(19,932.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 430.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT OF THE CASE.

This is an action for personal injuries originally brought by the plaintiff in error against defendants in error in the Circuit Court for the City of St. Louis, State of Missouri. The cause was removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri upon a petition of The National Enameling Company, one of the defendants in error, which petition alleges as grounds for removal that there is in said suit a controversy between citizens of different states and that it can be wholly determined between them, and also that there is a separable controversy stated upon the face of the petition which is wholly between the plaintiff and the removal petitioner. The removal petition is hereinafter set forth at length. Before the cause came on for trial the plaintiff in error moved to remand it to the State Court. The motion to remand is hereinafter set forth. This motion to re-

mand was overruled by the court. Thereafter the cause came on for trial. Plaintiff in error elected to stand upon his motion to remand and refused to recognize the jurisdiction of the court. Thereupon final judgment was rendered against the plaintiff in error from which he prosecutes this writ of error to this court.

The only question to be decided upon this writ of error is whether or not the court erred in deciding that plaintiff's cause of action, if any, is solely against The National Enameling and Stamping Company, the non-resident defendant, and in overruling for this reason the plaintiff's motion to remand.

PLAINTIFF'S PETITION.

Omitting the caption, plaintiff's petition is as follows: (Trans. pp. 3-5.)

> Plaintiff for his cause of action, states: That the said National Enameling and Stamping Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and that said Harry Schenk and George Wettengel are residents of the City of St. Louis, State of Missouri. That at and before the time of the commission of the said grievances hereinafter mentioned, said plaintiff was employed by said defendant to fire, fill, stir, empty and attend to certain large metal pots used by said defendant corporation for melting grease and lubricant matter at the plant operated by it at Granite City, County of Madison, State of Illinois. The said grease and lubricant matter was delivered by said defendant corporation to said plaintiff in solid form in barrels of great weight, to wit: about six hundred (600) pounds each. In the course of his said employment it was plaintiff's duty, after removing the barrels from around said grease and lubricant matter, to hoist the same to the top surface of the furnace structure, into which said pots were set, and to dump said grease and lubricant matter into the said pots. The said defendant corporation wholly and negligently failed to perform the duties, which as master it owed to said plaintiff, while engaged in its employment as aforesaid. Defendant's said negligence consisted in this, to wit: that it negligently allowed said pots, about which plaintiff was employed as aforesaid, and which were constantly filled with hot and boiling grease and lubricant matter, to remain open and exposed and negligently failed to provide for the said pots any covering, railing, or any device or means of any character whatsoever whereby to reasonably protect plaintiff, its servant, from accidentally falling or slipping into the same while engaged in the performance of his aforesaid duties. And said defendant corporation negli-

gently constructed said furnace structure in which said pots were set, on and about which said plaintiff was employed by said defendant corporation; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for said plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and said defendant corporation negligently gave to plaintiff such instructions as to the manner of performing his said duties as unreasonably endangered the safety of said plaintiff in carrying out the same.

As a result of the said premises and of said defendant corporation's said negligence, plaintiff, while engaged in the performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid open, unguarded and unprotected pots containing hot and boiling grease and lubricant matter; and received great and painful burns and injuries, the nature and extent of which are hereinafter more particularly described.

Plaintiff further says that the said Harry Schenk and the said George Wettengel were employed by said defendant corporation and charged by it with the superintendence and oversight of said plaintiff in the performance of his aforesaid duties and the said Schenk and the said Wettengel were employed by said defendant corporation and charged by it with the duty of superintending and properly planning the construction of the said furnace structure into which the said pots were set; and further charged by said defendant corporation with the duty of providing for said pots reasonably safe and suitable covering, railing, or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's aforesaid duties; and further charged by said defendant corporation with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and further charged by said defendant corporation with the duty of properly instructing said plaintiff as to the manner of performing said plaintiff's duties. Nevertheless said defendants, Harry Schenk and George Wettengel, negligently planned and directed the construction of the said furnace structure into which the said pots were set, so that same was not a reasonably safe place for plaintiff to work in the performance of his aforesaid duties; and negligently failed to provide for said pots reasonably safe and suitable covers or railing or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's afore-

said duties; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and negligently gave to plaintiff such instructions as to the manner of performing plaintiff's said duties as unreasonably endangered the safety of said plaintiff in carrying out the same. As a result of the said premises and of the said negligence of said defendants, said plaintiff while engaged in performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid unguarded and unprotected pots containing hot and boiling grease and lubricant matter and received great and painful injuries, the nature and extent of which are hereinafter more particularly described. The injuries which plaintiff received as aforesaid, on or about November 12, 1902, and which hereinbefore he has alleged were the result of the aforesaid negligence of said defendant corporation and of said defendants Harry Schenk and George Wettengel, were the result of the joint negligence of said defendants, and each act of negligence which plaintiff has hereinbefore charged against each of said defendants was the joint act of all of said defendants."

Then follows a statement of the character of plaintiff's injuries and prayer for judgment.

THE PETITION FOR REMOVAL.

Omitting the caption, the removal petition of The National Enameling and Stamping Company is as follows: (Trans. pp. 7-10.)

"To the Honorable, the Circuit Court of the City of St. Louis, State of Missouri:

Your petitioner, The National Enameling & Stamping Company, a corporation, limiting its appearance herein for the purpose of filing this petition, and not admitting the jurisdiction of this court, over it and appearing for no other purpose whatever, respectfully represents to the court that it is one of the defendants in the above entitled suit, and your petitioner shows unto the court:

That it is one of the defendants in the above entitled suit;

That the matter and amount in dispute in said suit exceeds, exclusive of interests and costs, the sum or value of two thousand dollars ($2,000.00);

That the said suit is of a civil nature at common law, of which the Circuit Court of the United States had original jurisdiction;

That said suit has been brought and is now pending in this court, and has not yet been tried, nor has the time within which this defendant, your petitioner, is required by the laws of the State of Missouri, or any rule of this honorable court to answer or plead to the complaint of the plaintiff elapsed;

That said plaintiff herein is now and was at the time of the bringing of this suit and ever since has been a citizen of the State of New Jersey, in which state it was then and ever since has been, and is now duly incorporated, and that it was not at the time of the commencement of this suit and never has been and is not now incorporated in the State of Missouri, nor a citizen thereof;

That Harry Schenk, one of the co-defendants in this suit, has not been served with process herein; that he was at the time of the commencement of this suit, ever since has been and is now a citizen of the State of Illinois, residing in Granite City, Illinois;

That the said co-defendant, George Wettengel, is now, was at the time of the commencement of this suit and ever since has been a citizen of the State of Missouri;

That there is in said suit a controversy wholly between citizens of different states, and which can be wholly determined between them, to-wit: Between your petitioner and the said plaintiff, and that said separate controversy is wholly between your said petitioner and said plaintiff, and the said co-defendants of your petitioner are not interested in the determination thereof or necessary parties thereto, and said separate controversy is this: That your petitioner at the time of the alleged accident to the said Conrad Wecker was the employer of the said Wecker, and the owner of the factory wherein he was working, as appears by the said petition on file, and the issue and controversy whether this defendant negligently allowed the pots about which the plaintiff was employed to remain open and exposed, and whether your petitioner negligently failed to provide for said pots any covering, railing or other means to reasonably protect the plaintiff from slipping or falling into the same while he was performing his duties, and whether your petitioner negligently constructed the said furnace structure upon which the said pots were set, and whether your petitioner negligently failed to provide proper and reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating the grease and lubricant matter to the top surface of the furnace structure, and whether your petitioner negligently gave the plaintiff such instructions as to the manner of performing his duties and unreasonably endangering the plaintiff in carrying out the same, which controversies and matters must be wholly determined between your petitioner and the said plaintiff, and

in which its said co-defendants, Schenk and Wettengel, can have no interest.

And your petitioner further shows unto your Honor that there is a separate controversy stated on the face of said petition which is wholly between the said plaintiff and your petitioner, and may be wholly determined between them without its co-defendants being parties thereto, and that said separate controversy is this: That the said co-defendants, as servants of your said petitioner, may not be joined in this suit against them for the matters and things alleged against them in the plaintiff's petition, and that as to the matters and things alleged against your petitioner in said petition, it appears from the face of the petition that these matters are matters wholly to be determined between the plaintiff and your petitioner, and which may not be determined between the plaintiff and its co-defendants

And your petitioner further avers that there is in said cause the further separable controversy, namely: Whether the said plaintiff assumes the risk of being injured while in his employment, and that this controversy is wholly between the said plaintiff and your petitioner, and its co-defendants have and can have no interest therein, and the same may be wholly determined between the plaintiff and your petitioner.

And your petitioner further avers that the said Henry Schenk and the said George Wettengel were not at the time of the accident to the said plaintiff, or prior thereto, charged with the superintendency and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the said furnace structure, into which the pots were set, and were not charged by the defendant with the duty of providing for the pots reasonably safe and suitable covering, railing or other device to protect plaintiff from slipping or falling into the same, and were not charged by the defendant with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of the said furnace structure, and were not charged by your petitioner with the duty of properly instructing the plaintiff as to the manner of performing said plaintiff's duties, and it is not true that the said defendants Schenk and Wettengel or either of them negligently failed to carry out the said alleged duties mentioned in plaintiff's petition or any of them; and it appears from the face of the plaintiff's said petition that the said plaintiff was not injured by reason of the failure of the said Schenk and Wettengel or either of them to perform any of the said duties alleged against them, but was injured from other and different grounds.

And your petitioner further avers that the said Harry Schenk being a citizen of the State of Illinois, that as to him and your petitioner, this suit is removable, and should be removed to the United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as herein prayed, and that as to the said George Wettengel, your petitioner charges and states the fact that he is improperly and fraudulently joined herein with your petitioner by the plaintiff in this suit, for the sole purpose of fraudulently and improperly preventing or attempting to prevent this petitioner from removing this cause to the United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as prayed for herein, and for no other purpose, and that the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was not in or about the place where the said plaintiff was injured at the time of the said injury; that he in no manner was in control or superintendent; that it was not his duty to plan the construction of the said furnace or to provide any covering, railing or other device in and about said pots or to provide reasonably safe and sufficient hoisting apparatus for plaintiff's use, but that the said plaintiff with this knowledge joined the said Wettengel herein solely to prevent the removal of this cause, and not in good faith.

And your petitioner further states that the petition herein states no cause of action against said Wettengel.

And your petitioner shows that by reason of the premises it desires and is entitled to have the said suit removed from the Circuit Court of the City of St. Louis, Missouri, into the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri.

And your petitioner offers herewith a bond with good and sufficient surety, for its entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, on the first day of its next term, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to provide no further order herein, except to make an order for the removal of this cause to the said Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, and to accept the said surety and bond, and to cause the record herein to be removed to the said Circuit Court of the United States, as herein prayed for."

This petition is verified by the affidavit of one Merritt U. Hayden.

THE MOTION TO REMAND.

Plaintiff's motion to remand, omitting the caption is as follows: (Trans., p. 14.)

> "Now comes the plaintiff in the above entitled cause and moves that the court remand same to the Circuit Court for the City of St. Louis, State of Missouri, because
>
> 1. There is not in said cause a controversy wholly between citizens of different states and which can be wholly decided between them.
>
> 2. There is not in said cause a separate controversy which is wholly between the said plaintiff and the said defendant, The National Enameling and Stamping Co., and which may be wholly determined between them without the said co-defendants being parties thereto.
>
> 3. The said defendant, George Wettengel, was not improperly and fraudulently joined as defendant herein for the purpose of fraudulently and improperly preventing, or attempting to prevent, the removal of this cause to this court."

AFFIDAVITS IN SUPPORT OF AND AGAINST MOTION TO REMAND.

In support of plaintiff's motion to remand, there was filed, omitting the caption, the following affidavit: (Trans., p. 16.)

> "Conrad Wecker, being duly sworn on his oath, says: That he was in the employment of the defendant, The National Enameling and Stamping Co., prior to and up to the time of the construction of the furnace structure mentioned in plaintiff's petition filed herein; and that George Eisenmayer was, prior to and up to the time of the construction of said structure, in the employment of said defendant company, and was charged with the general supervision of the work and business of the said company at the place at which plaintiff was employed and at which he received his injuries, as set forth in his petition filed herein. That just prior to the construction of the said furnace structure the plaintiff heard the said Eisenmayer direct the said defendant George Wettengel to prepare plans for a furnace structure to be erected upon the spot whereupon was shortly afterwards erected the furnace structure upon which plaintiff was at work when he received the injuries set forth in his petition; that plaintiff at the time he filed his petition herein believed, and still believes, that the said defendant George Wettengel planned and directed the construction of the said furnace structure as set forth in plaintiff's petition filed herein.
>
> CONRAD WECKER."

Against the motion to remand, there were filed, omitting captions, the following affidavits: (Trans., pp. 17, 18, 19.)

"George Eisenmayer being first duly sworn on his oath says that on the 12th day of November, 1902, and for some years previous thereto, he was in the employ of the National Enameling and Stamping Co., in the capacity of chief engineer, that as such chief engineer affiant was charged, among other things, with the duty of seeing to the repairs of the apparatus used by the defendant and also planning any new apparatus that was about to be adopted. Affiant further states that during said period it was customary for the National Enameling and Stamping Co. to do all or most of its own work, in connection with repairs and construction, and affiant states that in order to get proper execution of such work of repairs and construction George Wettengel was employed in the office of defendant as a draftsman, and that several other persons were employed in the said office as draftsmen. And affiant further states that the sole work of said George Wettengel, during the period above mentioned, was that of draftsman and that said George Wettengel had nothing to do with selecting plans and approving plans, but that his sole work was to take plans and ideas given to him, and to make the necessary drawings for the use of the mechanics.

And affiant further states that said George Wettengel, during said period, had no authority to employ or discharge men, or no authority whatever to superintend the work of any of the men, nor authority to give instructions to any of the men as to how they should do their work, and further affiant saith not.

GEO. F. EISENMAYER."

"George Wettengel being first duly sworn on his oath says that he is 28 years of age, and is one of the defendants in the above suit. Affiant states that at the time mentioned in plaintiff's petition, to-wit: The 12th day of November, 1902, and for about ten years previous thereto, affiant had been employed by the National Enameling and Stamping Company as a draftsman; that all his work was done in the office of said company, and that he had no work whatever outside of the office, and was not thrown in contact with the employees outside of the office, or with the plaintiff, and was charged with no duty whatever of superintendence in connection with the work of the outside employes, or with the plaintiff, at the time of said accident, or for several years previous thereto.

Affiant further states that he was not charged, at the time of said accident, or for several years previous thereto, with any duty of designing or planning the apparatus that was used in

the defendant's plant, but that the designing of all apparatus, and the selection of apparatus was made by other persons, and that the sole duty of affiant, at the time of said accident, and for several years previous thereto, was to attend to the mechanical work of drafting which was based exclusively upon the ideas and plans adopted by other persons. And affiant further states that he had no discretion whatever as to what sort of apparatus should be used in any part of defendant's plant; and with reference to the particular pots mentioned in plaintiff's petition, and into one of which plaintiff claims he fell, affiant states he had nothing to do with planning said pots, and had no right whatever to determine what sort of pots should be used, or whether a railing should be used, in connection with the same, or what sort of hoisting apparatus should be used.

And affiant further states that he is charged with no duty by defendant, in connection with the plaintiff, as to how and when he should do his work, but that affiant had no authority whatever to give any instructions. In short, affiant states that his position was a clerical position in the office, and his duties were confined to the actual making of drawings to enable mechanics to do construction work upon the basis of plans adopted by other persons than affiant in the employ of defendant. And affiant further states that there is no ground whatever for the suit of Conrad Wecker against affiant, and that in truth and in fact there is no possible ground upon which any charge can be made against this affiant in connection with the accident set out in plaintiff's petition, which occurred on November 12, 1902.

Affiant further states that at the time of the said accident, and for several years previous thereto, he did not know the plaintiff, Conrad Wecker, by name, and did not know what sort of work he was doing, or in what part of the defendant's plant he was engaged. And affiant further states that he was never thrown in contact with said Conrad Wecker in his work and was charged with no duty whatever of superintending the work of said Conrad Wecker or instructing the said Conrad Wecker how to do his work, and further affiant saith not.

GEO. WETTENGEL."

COURT'S OPINION IN OVERRULING MOTION TO REMAND.

The court overruled the motion to remand on December 22nd, 1904 (Trans., p. 15). And in overruling the motion delivered the following opinion, omitting caption: (Trans., pp. 25-27.)

"ADAMS, District Judge:

This action was instituted by the plaintiff in one of the Circuit Courts of the State. He charged in his complaint that he was employed by the defendant corporation to work about certain large metal pots used for the melting of grease and lubricant matter; that the corporation failed to use proper care to furnish a reasonably safe place for his work, or reasonably safe appliances with which he should work. The negligence is particularized as follows: That the corporation failed to provide the metallic pots with any covering, railing or other device to protect its servants from liability to fall into them. It is observed from this general statement, that the negligence charged against the corporation is a failure to perform that positive duty which the law imposes upon a master to provide a reasonably safe place and reasonably safe appliances for use of its servants.

After setting forth the facts already referred to the plaintiff avers: That the individual defendant Wettengel was employed by the corporation and charged with the duty of planning and constructing the bank of metallic pots, and with the duty of seeing that they were safely covered, railed off or otherwise protected, so that the employes might not be unreasonably exposed to danger; that as a result of what complainant denominates the joint negligence of both the corporation and Wettengel, he was precipitated into one of these metallic pots and injured.

In due course, the defendant corporation filed its motion to remove the cause from the state court to this court, alleging in its petition that the plaintiff was a resident of the State of Missouri; that the defendant corporation was a citizen of the State of New Jersey, and that defendant Wettengel was a citizen of the State of Missouri, and alleging further that defendant Wettengel was fraudulently joined as a defendant for the purpose of improperly preventing the removal of the cause to this court, and that there is a separable controversy within the meaning of the Judiciary Act of 1887, as amended by the Act of 1888, wholly between the plaintiff and the defendant corporation, which can be fully determined as between them, and with respect to which the defendant Wettengel has no concern.

Upon the filing of such a petition in the state court the cause was ordered removed to this court. The plaintiff now comes and moves to remand the cause to the state court on the grounds as alleged: (1) That Wettengel was not fraudulently joined as defendant for the purpose of preventing removal, and (2) that no separable controversy between the

plaintiff and the defendant corporation is disclosed by the complainant.

Plaintiff contends that the defendant corporation and the defendant Wettengel are properly joined, because they are charged to be joint tort feasors, and because both are liable to the plaintiff for the injury which he has sustained. The defendant contends that there is no liability stated as against defendant Wettengel, that the only liability stated in the pleading is against the corporation, and that as a result thereof the case was properly removed.

I have, as is well known by the bar, frequently ruled: That where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right (to remand?) of removal exists and can not be defeated by any showing alinude the complaint itself, that the two were not jointly liable. Such rulings have always been predicated upon the averments of the complaint as they there appear. But where a complaint discloses the fact that there can be no joint liability and that an allegation of that sort is groundless and fictitious, then such an allegation can not deprive the non-resident defendant of his right to remove the cause. Referring again to the averments of the complaint, it appears that the charges: That the defendant corporation failed to perform its duty in the matter of providing a reasonably safe place for the plaintiff to work, and that the defendant Wettengel was the agent of the corporation in the matter of making this provision. In other words the defendant Wettengel is charged in the complaint to have been acting within the scope of his duty as agent in the performance of one of the fundamental and positive duties of the master. He is charged with negligence merely—is not charged with wantonness, recklessness or other active misconduct. Does such a complaint disclose any cause of action at all against the agent? I think not. The only charge against him in legal effect is: That he failed to use reasonable care in doing the work of his principal. Such failure is a proper definition of negligence. Negligence is negative in character. It is the omission to perform some duty. Milwaukee R. R. Co. v. Ames, 91 U. S. 489. It implies nonfeasance as distinguished from mis-feasance. It certainly does not imply wantonness or recklessness or express malice. For acts of mere negligence without wantonness or express malice, the servant incurs no liability to a third person, the master alone is liable. Story on Agency, 9th Ed. 308, 309; Kelly v. C. & A. Railway Co., 122 Fed. 286; Davenport v. Southern Railway Co., 124 Fed. 983; Shaffer v. Union Brick Co.,

128 Fed. 97; Helms v. N. P. Ry. Co., 120 Fed. 389, and cases therein cited.

The complaint itself shows too much for the plaintiff's purposes. It clearly states him out of court as to defendant Wettengel. In the light of the averments of the case just referred to, the general broad statement of the legal conclusion that plaintiff was injured by the joint negligence of both the corporation and Wettengel, can have no effect.

The views already expressed are in harmony with the opinion of the Supreme Court of the United States in Chesapeake & Ohio Railway Company v. Dixon, 179 U. S. 131. Certain expressions are there employed which might give color to the contention of the plaintiff in this case. The court held in that case that the right of removal did not exist. In other words it held that the charge of concurrent negligence on the part of the railroad company and the engineer, might, so far as the petition disclosed, exist. The court there says; 'The negligence may have consisted in the fact that the train was run at too great speed; and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurring negligence is charged the controversy is not separable.' It seems obvious from the foregoing language that if the plaintiff in the Dixon case had charged that the only act of negligence was the running of the train at an excessive rate of speed, and that the company acted in the matter of operating the train solely by and through its agent the engineer, a different result would have been reached. As I understand that case, the conclusion reached, was based upon the facts appearing in the complaint, that a joint act of negligence was charged and no showing was otherwise made in the complaint negativing the joint and concurrent act of negligence.

I am therefore disposed to apply the doctrine of the case of Bank of Arapahoe v. Bradley, 72 Fed. 867, 872, and to hold that the joining of the individual defendant with the corporation in this case, is probably groundless and fictitious, and obviously intended to unlawfully deprive the defendant of the right given him to remove its cause into this court for trial. There is disclosed in the complaint but one cause of action and that is against the corporation.

The motion to remand is denied."

COURT'S ADDITIONAL OPINION DELIVERED ABOUT FOUR MONTHS LATER.

In overruling the plaintiff's motion in arrest, *about four months after* rendering the foregoing opinion, to-wit, April 18, 1905 (Trans., p. 21), the court delivered the following additional opinion: (Trans., p. 27.)

> "ADAMS, J.:
>
> The opinion rendered heretofore on the motion to remand made no allusion to the affidavits filed, tending to show the fictitious and fraudulent joining of defendant Wettengel, and it is sufficient now to say that they inevitably show that the inferences drawn from the allegations of the petition are correct.
>
> These affidavits may be considered on the question involved in the motion. Enstofen v. Chicago, R. I. & P. Ry. Co., 128 Fed. 85."

CERTIFICATE AS TO JURISDICTIONAL QUESTION.

The court below, upon being requested to certify the jurisdictional question to this court, made the following certificate, omitting caption: (Trans., p. 22.)

> "I, Elmer B. Adams, Judge of said court, hereby certify that the only question decided by the court in this cause is that the joining of defendant Wettengel as co-defendant with defendant National Enameling & Stamping Company, was palpably groundless and fictitious, and done for the purpose of unlawfully depriving the defendant Stamping Company of its right to remove the cause to this court for trial. For this reason the motion to remand the cause to the state court was denied. In deciding this motion the court took into consideration, not only the complaint and petition for removal, but the affidavits filed in support and opposition to the motion to remand. The plaintiff refused to submit to the jurisdiction of this court and suffered a dismissal of the suit for want of prosecution. The question is whether this court had jurisdiction of the action.
>
> Witness my hand this 26th day of April, A. D. 1905.
>
> ELMER B. ADAMS, Judge."

SPECIFICATION OF ERRORS.

First. The court erred in denying the plaintiff's motion to remand the cause to the Circuit Court for the City of St. Louis, State of Missouri.

Second. The court erred in holding that plaintiff in his petition does not state a joint cause of action against the said defendants, The National Enameling and Stamping Company and George Wettengel.

Third. The court erred in holding that plaintiff's complaint herein discloses but one cause of action and that against the defendant corporation.

Fourth. The court erred in conceiving that there is in said suit any controversy wholly between citizens of different states and which could wholly be determined between them.

Fifth. The court erred in dismissing plaintiff's petition and entering judgment in favor of defendants.

BRIEF OF THE ARGUMENT.

POINTS AND AUTHORITIES.

I.

The complaint discloses a joint cause of action against the master, the non-resident defendant, and the servant the resident defendant, in alleging plaintiff's injury as a result of their joint negligence; since a servant, as well as his master, is liable to third persons for injuries resulting not only from the servant's wilfulness, wantonness or recklessness, but also for injuries resulting from the servant's negligence in the performance of any task which the servant has actually undertaken.

(The following cases are referred to in the argument below):

Alabama Gt. Southern v. Thompson (U. S. Sup. Ct., Jan. 2, 1906), 26 Sup. Ct. Rep. 161;
C. & O. Ry. Co. v. Dixon, 179 U. S. 131;
Powers v. Ry. Co., 169 U. S. 92, l. c. 96-97;
Dougherty v. Atchison etc. Ry. Co., 126 Fed. 239;
Fogarty v. Ry. Co., 123 Fed. 973;
American Bridge Co. v. Hunt, 130 Fed. 302;
Hukill v. Ry. Co., 72 Fed. 745, 753;
Harriman v. Stowe, 57 Mo. 93;
Lottman v. Barnett, 62 Mo. 159;
Martin v. Benoist, 20 Mo. App. 262, 270;
Osborne v. Morgan, 130 Mass. 102;
Mayer v. Thompson etc., 104 Ala. 611;
Greenburg v. Whitcomb Lbr. Co., 90 Wis. 225;
Donnelly v. Huffschmidt, 79 Cal. 74;
Horner v. Lawrence, 37 N. J. L. 46;
Ellis v. McNaughton, 76 Mich. 237, 241;
Griffiths v. Wolfraum, 22 Minn. 185.

The following authorities, though not referred to in the argument, are to the same effect on the foregoing proposition:

C. N. O. & T. P. Ry. Co. v. Bohn, 26 Sup. Ct. Rep. 166;
Southern Ry. Co. v. Carson, 194 U. S. 136;
Dougherty v. Ry. Co., 122 Fed. 205;
Warax v. Ry. Co., 72 Fed. 637, 640;
Andrews v. Boedica, 126 Ill. 605;

Lough v. John Davis, 59 L. R. A. 802 (Wash.);
Bell v. Josselyn (Mass.), 3 Gray 309, l. c. 311;
Campbell v. Portland Sugar Co., 62 Me. 552;
Thompson's Commentaries on the Law of Negligence, Vol. 5, Sec. 5771;
Mechin on Agency, Secs. 571, 572;
Sherman & Redfield on Negligence, 5th Ed., Vol. I, Sec. 244.

II.

That negligence for which a servant is liable to a third person, that is, misfeasance, may consist not only in an act directly injurious to such person, but may as well consist in a negligent omission in the course of some task which the servant has undertaken, as a result of which negligent omission, such third person is injured.

Osborne v. Morgan, 130 Mass. 102;
Harriman v. Stowe, 57 Mo. 93;
Lottman v. Barnett, 62 Mo. 159;
Bell v. Josselyn, 3 Gray l. c. 311;
Donnelly v. Huffschmidt, 79 Cal. 74;
Hukill v. Ry., 72 Fed. l. c. 753;
Horner v. Lawrence, 37 N. J. L. 46;
Ellis v. McNaughton, 76 Mich. 241;
Griffiths v. Wolfraum, 22 Minn. 185;
Campbell v. Portland Sugar Co., 62 Me. 552;
Thompson's Commentaries on the Law of Negligence, Vol. 5, Sec. 5771.

III.

In order to justify removal on the ground of improper joinder of the resident defendant, it was necessary for the removal petitioner to both allege and prove that the allegation of joint liability made in the complaint was fraudulently made There was no evidence even tending to show such fraud.

Alabama Gt. Southern v. Thompson, 26 Sup. Ct. Rep. l. c. 164;
Louisville, etc., Ry. Co. v. Wangelin, 132 U. S. 599, l. c. 601;
Plymouth, etc., Co. v. Amador, etc., Co., 118 U. S. 264, 270;
Hukill v. Ry. Co., 72 Fed. 745;
Warax v. Ry. Co., 72 Fed. 637;
Landis v. Felton et al., 73 Fed. l. c. 311;
Foster on Federal Procedure, Vol. II, p. 925, Sec. 384.

IV.

The affidavits filed by the non-resident defendant in opposition to the motion to remand and which the court in its certificate as to the jurisdictional question says that it took into consideration in deciding that the allegations of joint liability were fraudulent, do not even charge fraud or state any facts from which an inference of fraud may be drawn, or even negative the joint liability made out by the allegations of the petition. (See affidavits, Trans., pp. 17, 18 and 19.)

ARGUMENT.

I.

A SERVANT LIABLE FOR INJURY TO THIRD PERSONS RESULTING FROM HIS NEGLIGENT ACTS OR OMISSIONS IN THE COURSE OF HIS EMPLOYMENT.

The complaint in this case does not charge the defendants with wantonness or recklessness or express malice. It only charges the defendants with negligence. For this reason, it was held by the court below that complaint discloses no cause of action against the resident defendant, the servant, but only a cause of action against the employer, the non-resident defendant. The holding of the court below is in this language (Trans., p. 26):

> "For acts of mere negligence without wantonness or express malice, the servant incurs no liability to a third person, the master alone is liable."

This conclusion is obviously inconsistent with principles of law which the court below itself in the course of its opinion recognizes as unquestioned. It is not only contrary to the overwhelming weight of authority, but we do not think that any authority can be cited which really supports such a proposition. The court below in the course of its opinion recognizes the joint liability of master and servant for the negligence of the servant in the following language (Trans., p. 26):

> "I have, as is well known by the bar, frequently ruled: that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right of removal (meaning evidently the right to remand) exists and cannot be defeated by any showing aliunde the complaint itself, that the two were not jointly liable."

The court in commenting on the case of C. & O. Ry. Co. v. Dixon, also says (Trans., p. 27):

> "As I understand that case, the conclusion reached was based upon the facts appearing in the complaint, that a joint act of negligence was charged and no showing was otherwise made in the complaint negativing the joint and concurrent act of negligence."

After thus clearly recognizing the principle announced in the Dixon case, that the action is joint, that the right of removal does not exist, and that the cause should be remanded where there is, in the complaint, in appropriate language a charge of joint negligence against the master and servant, the court proceeds further to hold that, since upon analysis of the complaint, it appears that master and servant are charged jointly with joint negligence only, no joint cause of action is stated since the servant is not liable to third persons for negligence, but only for recklessness, wantonness, or express malice. If the servant is not at all liable to third persons for negligence, how can the court below justify its course in that it has "frequently ruled that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence," a joint cause of action is stated, if the complaint does not upon further examination disclose a want of joint liability. If the servant is jointly charged with the master with something for which the servant is not liable to the complainant, to-wit, negligence, why is it necessary to examine further into the complaint in order to determine whether by other allegations a want of joint liability is disclosed. The rule laid down by the court below leads inevitably to the conclusion that it is disclosed at the very outset. What then could be more inconsistent than the ruling of the court below that where the complaint charges joint negligence and shows nothing more, a joint cause of action is stated, but if the complaint upon analysis shows specific allegations of the same thing, to-wit, joint negligence only, no cause of action is stated? The court below does not arrive at this conclusion as the result of any distinction drawn from the specific allegations of the complaint between actual and imputed negligence of the manter, but contents itself with a course of reasoning which leads to the bald, self-contradictory proposition just stated.

The court below, in support of the proposition that a servant is not liable to third persons for his negligence, cites the following authorities:

Story on Agency, 9th Ed. 308, 309;
Kelly v. C. & A. Ry. Co., 122 Fed. 286;
Davenport v. Southern Ry. Co., 124 Fed. 983;
Shaffer v. Union Brick Co., 128 Fed. 97;
Helms v. N. P. Ry. Co., 120 Fed. 389.

A brief examination of these authorities will disclose that they do not support that proposition:

Story in his work on Agency in the section cited by the court below merely announces the proposition that an agent is liable to third persons only for misfeasance and not for mere nonfeasance in the performance of his duty. But Story does not by any means announce the proposition that, in order to be guilty of misfeasance, a servant or agent must be guilty of wantonness, recklessness or express malice.

Kelly v. C. & A. Ry. Co., 122 Fed. 286, was a suit against the railway company and one of its employes, a yardmaster, whose duty it was, under his contract with the company, to inspect engines. As a result of the failure of the individual defendant to inspect a certain engine, it was alleged that its boiler exploded, causing the injury complained of. It expressly appears from the opinion that the individual defendant

> "failed to make an inspection of the engine so as to ascertain its unsafe condition and that by reason of this neglect *in not making the inspection and repairs* (italics ours) the engine was not capable of standing the pressure of steam requisite to pull the train of cars in question and that the explosion ensued."

It was held there that the negligence charged was mere nonfeasance, for which the servant was not liable to third persons. It will be observed that it appears that the individual defendant did not undertake the performance of that task, did not enter upon the work of inspecting and repairing that engine. It is apprehended that, if it had been charged that the individual defendant actually entered upon that work and negligently inspected and repaired the engine, and that, as a result thereof, plaintiff was injured, the ruling of the court would have been different.

In the case of Davenport v. Ry. Co., 124 Fed. 983, cited by the court below, the complaint charged that the injuries sued for resulted from the joint "carelessness, negligence, recklessness, wantonness and wilfulness of the defendants," and the complaint itself disclosed that the actual recklessness, wantonness, etc., was that of the individual defendants, the servants, and that the master was chargeable only with imputed negligence. The court held that the master and servant were not liable in a joint action because,

1. There is no joint liability on the part of the master and servant when the negligence of the master is only imputed and not actual;

2. Since the complaint disclosed recklessness on the part of the servant, the measure of damages as against the master and servant would be different, and there was, therefore, no joint liability.

It thus appears that while the court below cites this case upon the proposition that there is no joint liability disclosed against the master and servant, *unless* the complaint charges recklessness, etc., the case cited is so far from supporting the proposition that it actually holds the contrary, to-wit, that there is no joint liability, if recklessness on the part of the servant *is* charged.

The case of Shaffer v. Union Brick Co., 128 Fed. 97, holds exactly contrary to the proposition upon which it is cited by the court below. It holds that both master and servant are liable for the negligence of the servant in the course of his employment; but unless there is actual negligence of the master concurring with that of the servant, they are not jointly liable. If the negligence of the master is only imputed, they are severally liable. However, upon this last point the decision was overruled by the recent decision of this court in Alabama Great Southern Ry. v. Thompson et al., supra.

In the case of Helms v. Ry. Co., 120 Fed. 389, the decision is the same as in the Shaffer case.

Not one of these decisions, it seems to us, appears [illegible] slightest degree to support the proposition laid down by the [illegible] below upon which they are cited, to-wit, that a servant is not liable to third persons for negligence in the course of his employment.

The question of liability of a servant to a third person for negligence in the course of his employment resulting in injury to such third person and the joint liability of the master and servant in such case, whether the negligence of the master be actual or imputed, is conclusively settled by a recent decision of this court in an opinion by Justice Day, in the case of Alabama Great Southern Ry. v. Thompson, decided January 2, 1906, 26 Sup. Ct. Rep. 161. In that case, the following questions were certified to this court by the court below:

> "(1) May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?
>
> (2) Is such a suit removable by the corporation as a separable controversy when the amount involved exceeds $2000.00, exclusive of interest and costs, and the requisite diversity of citizenship exists between said company and the plaintiff, the citizenship of the individual defendant sued with the company as joint tort feasors, being identical with that of the plaintiff?"

This court, after a full and careful consideration and review of the authorities, answers in the following language (l. c. 166):

> "We answer the first question: That for the purpose of determining the right of removal, the cause of action must be deemed as joint. The views herein expressed lead to an answer to the second question in the negative."

The cases in which servants are held liable to third persons, where there is no charge of recklessness, wantonness, etc., but a charge only of negligence, are very numerous and of high authority. See authorities cited under Division I, Points and Authorities.

Among those cases in addition to the recent decision of this court just quoted from, the following are cases in which master and servant are held jointly liable where the charge is of negligence only.

> C. & O. v. Dixon, 179 U. S. 131;
> Powers v. C. & O. Ry., 169 U. S. l. c. 97;
> Dougherty v. Atchison, etc., 126 Fed. 239;
> Fogarty v. Ry. Co., 123 Fed. 973;
> Am. Bridge Co. v. Hunt, 130 Fed. 302.

In view of these authorities and of well recognized principles of the law of negligence, it is difficult to see how the court below could have arrived at the conclusion announced in its opinion,

> "that the joining of the individual defendant with the corporation in this case is probably groundless and fictitious and obviously intended to deprive the defendant of the right given it to remove its cause into this court for trial" (Trans., p. 27);

and how the court could have based such a conclusion entirely upon the proposition that the complaint discloses but one cause of action, in as much as it charges master and servant with negligence only. It is true the court, in a supplemental opinion handed down about four months after the opinion above referred to, sees fit to vouchsafe an additional reason for its ruling. This will be considered later.

The court below lays down the broad proposition that mere negligence is mere nonfeasance, for which the servant is not liable to third persons, and that in order to be guilty of misfeasance, for which he is liable, the servant must be guilty of negligence so gross as to amount to wantonness or recklessness, or must be guilty of express malice. Such definition of misfeasance and nonfeasance is not supported by the authorities. However, it may be well in this connection to consider the question: What is that negligence amounting to mere nonfeasance for which a servant is not liable to third persons, and what is that negligence amounting to misfeasance for which the servant is liable to third persons?

II.

THE NEGLIGENCE CHARGED IN THE COMPLAINT AMOUNTS TO MISFEASANCE.

We desire to preface what follows under this heading by saying that, while we think that the authorities referred to and discussed down to Division III, page — of this brief, show conclusively that the complaint herein states a joint cause of action and charges the defendant Wettengel, the servant, with negligence, which is not mere nonfeasance, it is nevertheless true, under the rule announced by this court in its recent decision in Alabama Great Southern v. Thompson, supra, that even though the plaintiff has misconceived his cause of action, and even though upon a proper presentation of the question this court might hold that the cause of action disclosed by the complaint is not really joint, it is yet joint for purposes of removal, if the complaint is in good faith. Upon that point, this court, in the recent case of Alabama Great Southern v. Thompson, says:

> "In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the State Court by the filing of a declaration in which he alleged a joint cause of action. Does this become a separable controversy within the meaning of the Act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think in the light of adjudications above cited from this court it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the State Court will hold it not to be so. It may be (which we are not called upon to decide now) that this court would so determine, if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal."

Therefore, the authorities discussed below down to Division III need be considered only upon the question—if there can be such a question—as to whether or not the allegations of the complaint itself so palpably disclose a want of joint liability as to justify the imputation that the allegation of joint liability was not made in good faith.

Much has been said about misfeasance and nonfeasance, and the courts and text-writers have not always clearly drawn the distinction between the two kinds of negligence. However, we think that it is now well settled by the great weight of authority

that, while a servant is not liable to a third person, if such third person is injured as the result of the servant's negligent failure to enter upon the performance of a task which the servant is under contract to perform for his master; yet, if the servant once undertakes the performance of a task, he is liable for any negligence in the course of the performance of that work, as a result of which a third person is injured, whether such negligence consists in a negligent act or a negligent omission.

Perhaps the leading case on that subject is the case of Osborne v. Morgan, 130 Mass. 102, 39 Am. R. 438. That was a case in which the defendant, acting as servant for another, suspended a block and chain from the ceiling and negligently left it in such an unsafe and insecure condition that it afterward fell and injured a fellow servant, the plaintiff in the case. The court below sustained a demurrer to the petition on the ground that the defendant's negligent act was mere nonfeasance for which he was liable only to his master. The Supreme Court of Massachusetts in an opinion by Chief Justice Gray, held that such negligence was not mere nonfeasance but amounted to misfeasance for which the servant was liable to a third person. In so holding, the court said:

> "It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance, and it is doubtless true that if an agent never does anything towards carrying out his contract with his principal but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it his duty to use reasonable care in the manner of executing it so as not to cause any injury to third persons which may be the natural and probable consequence of his acts, and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance and doing improperly.
>
> Ulpian on Dg. 9, 2, 27, 9;
> Parsons v. Winchell, 5 Cuch. 592;
> Bell v. Josselyn, 3 Gray 309;
> Navel v. Wright, 3 Allen 166;
> Horner v. Lawrence, 8 Vroom 46 ***

The fact that a wrongful act is a breach of contract between the wrongdoer and one person does not exempt him

from responsibility, for it is a tort to a third person injured thereby."

The case of Kelly v. Ry. Co., 122 Fed. 286, cited by the court below, furnishes a good illustration of negligence which amounts to nonfeasance only. In that case, the individual defendant was employed to inspect and repair engines. It appears that the individual defendant did not enter at all upon the work of inspecting and repairing the particular engine on account of the defect in which the plaintiff was injured. It was alleged,

> "that by reason of this negligence *in not making the inspection and repairs* (italics ours) the engine was not capable of standing the pressure of steam requisite to pull the train of cars in question and that the explosion ensued."

But in the case at bar it appears form the complaint that the individual defendant is charged with having actually entered upon the performance of the work in question and with being guilty of negligence in the course of the performance of that work. The petition, after setting forth the duties with which the individual defendant was charged by the master, proceeds further to charge (See trans. p. 5) that the individual defendant

> "negligently planned and directed the construction of the said furnace structure into which the said pots were set, so that same was not a reasonably safe place for plaintiff to work in the performance of his aforesaid duties."

So that in the case at bar, it clearly appears from the complaint that, if the plaintiff was injured as the result of a negligent omission of the individual defendant, that negligent omission occurred in the course of the performance of a work which the individual defendant had actually undertaken, to wit, the planning and direction of the construction of that furnace structure.

That such a negligent omission in the course of work which the servant has undertaken constitutes misfeasance for which the servant is liable to third persons has been often decided.

In the case of Hukill v. Ry. Co., 72 Fed. l. c. 753, it appears that the individual defendant was charged in the complaint with having negligently left a car upon the sidetrack with a board projecting therefrom in a defective, unsafe and dangerous condition, whereby the plaintiff was injured. It was there contended that the negligent failure of the individual defendant to put the car in a safe condition was mere nonfeasance. It was held otherwise. The court on page 753 says:

> "This was misfeasance, because, but for their act in placing the car where it was in its dangerous condition, the plaintiff would not have been injurrd. It is quite like the case considered by the Supreme Judicial Court of Massachusetts in Osborne v. Morgan, 130 Mass. 102. There it was held that a servant who attached a block and tackle to the ceiling in the

course of his employment, and did not sufficiently secure it to prevent its falling, was directly liable to a fellow servant who was injured by the fall. * * *

In much the same way, when the car inspectors moved this car into a place where its defective condition would in all probability injure some one, they were doing something improperly instead of doing nothing."

Likewise it may be said in the case at bar that when the individual defendant so planned and directed the construction of this furnace structure as to render it an unsafe and dangerous place at which to work and likely to prove injurious to any person employed about the structure, the defendant was guilty of misfeasance. The same rule of law has been recognized in the following cases:

Harriman v. Stowe, 57 Mo. 93. A case where the defendant, as agent of another, negligently constructed a door or hatchway through which plaintiff fell and was injured.

Lottman v. Barnett, 62 Mo. 166. A case where the defendant, as agent of another, in superintending the construction of a building negligently left a column therein in defective condition. Thereafter plaintiff was injured by the fall of the building.

Martin v. Benoist, 20 Mo. App. 263, 270. A case where defendant, as agent of another, constructed a tunnel for a sewer pipe along the foundation of plaintiff's cellar and negligently refilled the tunnel with loose dirt through which the water percolated into plaintiff's cellar to plaintiff's injury.

Greenburg v. Whitcomb Lbr. Co., 90 Wis. 225. A case where an agent charged with the duty of providing machinery set plaintiff to work at a machine which the agent knew to be dangerous.

Dougherty v. Atchison, etc., Ry. Co., 126 Fed. 239. A case where the defendant, the conductor of a train, received an insane person as a passenger without an attendant and negligently failed to put such insane person under control upon complaint of the plaintiff.

Mayer v. Building Co., 104 Ala. 611. A case where defendant, as agent or employee of another, negligently constructed a wall, as a result of which plaintiff, a third person, was injured by a falling brick.

Horner v. Lawrence, 27 N. J. L. 46. A case where the defendant, as agent or employee of another, negligently left down a gap through which the hogs of the third person escaped and were killed.

Donnelly v. Huffschmidt, 79 Cal. 74. A case where defendants, as agents or employees of another, in the repairing of a range located in the house in which plaintiff lodged as a tenant, negligently left a box in the pathway over which the plaintiff stumbled in the dark and was injured.

Ellis v. McNaughton, 76 Mich. 241. A case in which defendant, as agent of another, in the construction of a building, negligently left a walk in the front in an unsafe condition as a result of which plaintiff was injured.

Griffiths v. Wolfraum, 22 Minn. 185. A case where defendants, as agents of another, were employed to construct a wooden framework over which an arch of masonry was to be built. As a result of negligence of the defendants in the construction of this framework, it fell, injuring plaintiff, a third person.

In all of these cases and in many others to which the court might be referred, it has been held that when one has been injured as the result of negligence of some person in the employment of another, the person so injured is entitled to recover, even though his injury resulted not from any intentional act nor from any positive act of the servant, but merely from the negligent omission of the servant in the course of the work which the servant had undertaken to do. It seems to be well settled that a negligent omission under such circumstances is just as much a misfeasance as is a negligent act.

We think that the foregoing authorities show, past all question, that the plaintiff in his petition states a joint cause of action against the resident and non-resident defendants in this case. We so construe the decisions; but even if we are wrong in this view of the law, it is sufficient, under the rule announced by the court in Alabama Great Southern v. Thompson, *supra,* if the authorities even so far justify this view as to relieve plaintiff and his counsel from the imputation that the allegations of the complaint itself so clearly disclose a want of joint liability that a claim of such liability is obviously in bad faith.

The rule above referred to in Alabama Great Southern v. Thompson had been previously recognized in a number of cases and quite clearly by Justice Brewer in the following language used in Hax v. Caspar, 31 Fed. 499:

> "Nor is there any propriety in the court now considering the sufficiency of this complaint as a complaint. Whether it does or does not state a cause of action is not a question to be considered on the motion to remand. That is a matter which the court in which the proceedings are finally tried has a right to determine, and no court, upon a motion to remand, ought to consider the sufficiency or insufficiency of the bill. It is enough that the plaintiff in the state court has stated what seems to be a single cause of action, affecting, perhaps, differently, different defendants, but still only a single cause of action; and that it does not appear that any defendant is collusively or improperly joined to prevent a removal."

III.

NO PROOF THAT THE INDIVIDUAL DEFENDANT WAS FRAUDULENTLY JOINED IN THIS CASE.

The court's opinion overruling the motion to remand in this case was delivered December 22nd, 1904 (Trans., p. 15). It appears from the opinion itself (Trans., pp. 25-27) that the court's action was based entirely upon the ground that the complaint upon its face stated no joint cause of action, and upon that ground the court in that opinion held that the joining of the individual defendant "is probably groundless and fictitious and obviously intended to deprive the defendant of the right to remove its cause into this court for trial." Afterwards, about four months later, on the 18th day of April, 1905 (see Trans., p. 21), the court overruled plaintiff's motion in arrest of judgment and in overruling the motion in arrest of judgment rendered the supplemental opinion appearing on page 27 of the transcript, in which the court says that the affidavits filed upon the motion to remand "inevitably show that the inferences drawn from the allegations in the petition are correct." What is the inference which the court draws from the allegations of the petition? It is that inasmuch as the individual defendant does not appear from the allegations of the petition to have been guilty of recklessness, wantonness or express malice, but of negligence only, it was fraudulent for the plaintiff to join the individual defendant. If that inference is correct, that is, if such conduct on the part of the plaintiff constitutes fraud, then it may be true that the affidavits tend to support that inference; but the decisions of this court and other courts cited in the foregoing part of this brief show conclusively that that inference is not correct, that the plaintiff had a right to join the individual defendant, even though he appears to have been guilty of negligence only. However, in refusing to remand the case, while there were on file at the time the affidavits referred to, the court clearly based its ruling upon the petition itself. This appears from examination of the court's first opinion. The court was at that time clearly of the opinion that it was improper for the court to consider anything aliunde the complaint itself. The court says: (Trans., p. 26.)

> "I have, as is well known by the bar, frequently ruled: that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right of removal [to remand] exists and can not be defeated by any showing aliunde the complaint itself, that the two were not jointly liable. Such rulings have always been predicated upon the averments of the complaint as they there appear."

Then the court proceeds to analyze the complaint and, as pointed out in the preceding part of this brief, arrives at the conclusion that the complaint itself discloses no joint cause of action. The affidavits referred to, which appear on pages 17-19 of the transcript, may tend to support the inferences which the court draws, as much as does the complaint from which the court originally drew those inferences; but we submit that neither the complaint nor the affidavits justify the serious imputation of fraud and misconduct which the court has cast upon the plaintiff and his counsel. If the affidavits referred to are examined by this court, it will be observed that, while those affidavits partially deny the existence of the facts set up in the complaint, they do not state that plaintiff or his counsel knew that any of the allegations of the complaint were false, nor that any of the allegations of the complaint were not made in good faith and with the expectation of proving them. The mere fact that plaintiff has made allegations which are not true, if he has done so, should not subject him to the charge of fraud, unless those allegations were known to be false. It is not necessary to cite any authorities upon the proposition that an allegation which is untrue is not for that reason necessarily fraudulent. It is well settled that such allegation is not fraudulent unless known to be untrue. The affidavits, therefore, do not charge the plaintiff with any fraud. There was no oral testimony heard on the motion to remand. It appears that the court below drew the inference in question solely from the complaint and the affidavits. This court is, therefore, in the same position as the court below to pass upon the question as to whether that complaint and those affidavits show any fraud.

Plaintiff in his affidavit (Trans., p. 16) says that one Eisenmayer was the general superintendent of the defendant company; that he heard Eisenmayer direct the defendant Wettengel to prepare plans for a furnace structure to be erected upon the spot whereon was shortly afterward erected the furnace structure in question; that at the time of filing his petition plaintiff believed and still believes defendant Wettengel planned and directed the construction of that furnace structure. If this be true, plaintiff was justified in attempting to hold Wettengel jointly liable with his employer. The affidavits of Eisenmayer and Wettengel, filed by defendants (Trans., pp. 17-19) do not even deny plaintiff's claim that Wettengel, the individual defendant, performed a part in the construction of the furnace structure in question. Much less do they tend to show that plaintiff had no good reason to believe and was guilty of fraud in alleging that defendant Wettengel was responsible for the manner in which the structure in question was constructed. It is alleged in the affidavit of Eisenmayer that he was the superintendent; he was the person who originated the plans and ideas and

"that the sole work of Wettengel, during the period above

mentioned was that of draftsman and that said George Wettengel had nothing to do with selecting plans or approving plans, but that his sole work was to take plans and ideas given to him, and to make the necessary drawings for the use of the mechanics."

Wettengel's affidavit is to the same effect. These affidavits then are not even a denial of the allegations of the petition, that defendant Wettengel was charged by the defendant corporation with the duty of "properly planning the construction of the said furnace structure into which the said pots were set," and that he "negligently planned and directed the construction of the said furnace structure into which the said pots were set so that same was not a reasonably safe place for plaintiff to work." The affidavits are a qualified admission of those allegations, and the claim made in the affidavits that Wettengel acted upon ideas originated by Eisenmayer is purely argumentative and only raises a question as to what is the legal effect of Wettengel having acted in the preparation of those plans not entirely upon his own ideas but wholly or in part upon the suggestions of another. It is admitted that it was Wettengel's work "to make the necessary drawings for the use of mechanics." This being true, it is obviously a question for the determination of the court to which the cause is finally submitted as to whether or not Wettengel's liability for the manner in which the furnace was constructed is at all affected by the question as to whether he himself originated the ideas in accordance with which those drawings were made by him or as to whether those ideas were originated by another. However, we will here take occasion to remark that where one is injured as the result of exposure to the risk of working in a place or with an appliance not reasonably safe, it would be imposing a novel and unusual burden upon the injured party to require him to trace down to its origin the "idea" in accordance with which the appliance or place was made defective or dangerous. In the case, for instance, of Osborne v. Morgan (*supra*), where a servant was held liable to another servant for an injury resulting from a negligently hung block and tackle, we apprehend that the judge who wrote that opinion would have given little weight to a plea that the defendant in hanging the block and tackle acted in accordance with "ideas" originated by another. But be that as it may, the affidavits in question were filed by the defendant for the evident purpose of showing that as a matter of fact the individual defendant is not liable as charged. The court below in its first opinion refuses to consider them for that purpose, announcing that it has been its rule to hold that where joint negligence is charged in appropriate terms and the complaint itself does not disclose a want of joint liability, the right to have the cause remanded "can not be defeated by any showing aliunde the complaint itself that the two were not jointly liable. *Such rulings have*

always been predicated upon the averments of the complaint as they there appear." The court then proceeds to analyze the complaint itself and concludes, "The *complaint itself* shows too much for the plaintiff's purposes. It clearly states him out of court as to defendant Wettengel. And upon this conclusion bases its ruling and inference that the allegations of joint liability were fraudulently made. Four months later, the court mentions the affidavits which at the time of its original ruling it refused to consider, and says that the affidavits tend to support the conclusion which the court previously drew that the allegations of the petition as to joint liability were fraudulent. The court draws from the complaint the inference that the injury suffered by plaintiff was due to mere negligence of the individual defendant and not to any recklessness, wantonness or express malice, and that for this reason it was fraudulent for plaintiff to charge the individual defendant with joint liability. The affidavits, like the original complaint, fail to show reckless or wanton injury of plaintiff by the individual defendant, and to this extent, and this extent only, do the affidavits tend to support the inference drawn by the court. Defendant's affidavits were not considered by the court below for the purpose for which they were evidently originally filed, to-wit, for the purpose of showing a want of joint liability aliunde the complaint itself. Four months after its original ruling, the court adverts to them for a purpose for which they were obviously not intended, to-wit, for the purpose of showing that plaintiff was guilty of fraud in alleging joint liability. If these affidavits had been intended for any such purpose, it would have been alleged by the affiant that plaintiff at the time of filing his petition knew that the "ideas" put into effect in the construction of the furnace structure were not original with Wettengel, and that plaintiff knew of the truth of other statements contained in the affidavits intended to show a want of liability on Wettengel's part. But the affidavits filed in support of the removal petition do not thus or in any way charge plaintiff with guilty knowledge of the falsity of any allegation of his petition.

It is well settled that upon a motion to remand, where the plaintiff has stated in his complaint a joint cause of action against the resident and non-resident defendants, the burden is upon the removal petitioner both to allege and to prove that the plaintiff was guilty of fraud in making his allegation of joint liability.

In Landers v. Felton, 73 Fed. l. c. 313, it is said:

> "The averments of the petition do, however, justify the joinder of the Southern Railway Company with the receiver. The petition for removal seeks to question the bona fide character of these averments. The petition is verified by the re-

ceiver, but no evidence is offered to show that these averments were fraudulently made, unless the affidavit of the receiver to the petition can be regarded as such proof. I do not think that it can be. If such an averment is to be proven, it should be by circumstantial and detailed evidence, so that the court may judge whether the charge of bad faith in the averments, for that purpose of evading the jurisdiction of the court, is sustained. The burden in such a case, and on such an issue, is, of course, upon the removing party."

In Alabama Great Southern Ry. Co. v. Thompson, *supra, l. c.* 164, it is said:

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In the case of Warax v. C. N. O. & T. P. Ry. Co., 72 Fed. 640, it appeared that the resident defendant, an engineer, had been joined with the non-resident defendant, a railway company. It was charged that such joinder was improper. The court, upon that proposition (l. c. 640) said:

"In order that such joinder be regarded as fraudulent, it must appear by allegation and proof, not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the petition upon which the right to join the defendants is claimed are so unfounded and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action. No proof is offered in this case, except the fact that suit was once brought on the same cause of action against the Railroad Company without joining Snyder the engineer. This may be regarded as a circumstance tending to show that the purpose in joining Snyder was to avoid the jurisdiction of the federal court, but it does not show, or have any tendency to show, that the averments of the petition with respect to Snyder upon which the right to join Snyder is asserted, were unfounded in fact. One who has a real cause of action for a joint tort against two persons can not be deprived of the right to bring his action against both as defendants, merely because he joined them for the purpose of avoid-

ing the jurisdiction of the federal court. If the right exists, the motive for its exercise can not defeat it."

The other cases cited under subdivision III, page 17 of this brief, amply support the doctrine announced in these cases.

Furthermore, as distinctly recognized in the cases of Landers v. Felton, and Alabama Gt. So. v. Thompson, quoted from *supra*, mere affidavits are not sufficient to establish a charge of fraud. It is true, affidavits are admissible for certain purposes in certain interlocutory proceedings, but no case will be found, with the exception of the decision of the court below in this case, where the issue was as to the existence of fraud, in which a court has convicted a litigant and his counsel of fraud upon any such ex parte showing.

The court, in its supplemental opinion (Trans., p. 27), cites the case of Enstophen (Gustavson) v. Ry. Co., 128 Fed. 85, in support of the proposition that affidavits might be considered for that purpose. But in that case it appears that the court arrived at its conclusion that there had been a fraudulent joinder upon oral testimony, and it does not appear that affidavits were either filed or considered.

Upon the question of the admissibility of an affidavit as evidence, in Wigmore on Evidence, Vol. 3, Sec. 1708, it is said:

> "The requirement of cross-examination, or an opportunity therefor, which is the essential feature of the Hearsay rule, is clearly not satisfied when an affidavit is offered, because, though under oath, it is utter ex parte, without notice to the opponent to afford him the opportunity of cross-examination. Even, if notice were in fact given, in a particular case and the opportunity of attendance thus afforded, the sworn statement thus made would not of itself satisfy the rule; for unless the officer before whom the oath was taken were one empowerd by law to supervise and direct the procedure of taking the testimony, it could not be conceded that there was a real opportunity for a cross-examination in a true and adequate sense. So that, in order truly to furnish such an opportunity, the officer must be thus empowered, and then the sworn statement becomes in effect a deposition, which is conceded at common law to be admissible.
>
> At common law, an affidavit, i. e., a mere sworn statement made out of court, is inadmissible for lack of opportunity of cross-examination."

In support of this proposition the author cites the following cases:

> Pickering v Townsend, 118 Ala. 351; 23 So. 703;
> Smith v. Feltz, 42 Ark. 355, 357;
> People v. Plyer, 126 Cal. 379; 58 Pac. 904.

In Walsh v. Rogers, 13 How. 287, it was said by this court, through Justice Grier, referring to ex parte depositions:

> "Testimony thus taken is liable to great abuse. At best it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have so much or so little of the truth or such a version of it as will suit his case."

We conclude, therefore, that inasmuch as the complaint states a joint cause of action against the non-resident defendant, National Enameling and Stamping Company, and the resident defendant, George Wettengel; and inasmuch as the non-resident defendant, in support of its charge that the allegations of joint liability were fraudulently made, offered nothing except certain affidavits, which appear in the record, which affidavits do not even charge fraud or state facts from which an inference of fraud may be drawn; and inasmuch as those affidavits, upon being analyzed, do not even negative the allegations of joint liability in the complaint; and as there is nothing whatever to show that those allegations were not made in perfect good faith by the complainant and his counsel, the court below clearly erred in overruling the motion to remand.

Respectfully submitted,

EDWARD C. KEHR,
Attorney for Plaintiff in Error,
with him on the Brief,

RICHARD T. BROWNRIGG,
AND WILLIAM L. MASON.

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JAMES H. McKE

BRIEF OF PLAINTIFF IN ERROR

ON MOTION TO DISMISS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

EDWARD C. KEHR,
Attorney for Plaintiff in Error,
with him on the Brief,
RICHARD T. BROWNRIGG,
AND WILLIAM L. MASON.

[19,932.]

(19,932.)

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BRIEF OF PLAINTIFF IN ERROR UPON MOTION TO DISMISS.

STATEMENT.

Counsel for defendants have filed a motion to dismiss the writ of error.

There has not been at the time of the preparation of this brief a compliance with the requirements of rule six of this court with reference to serving notice of motions to dismiss. Unless proper evidence of compliance with that rule shall have been furnished prior to the submission of the motion, we object to its consideration by the court. We do not know when it is proposd to submit the motion.

Since the printing of this brief, we have been served with notice of the motion. Notice was served November 12, 1906.

The motion to dismiss alleges two grounds:

1. That there has been no final judgment.

2. That there are other questions in issue before the court than the question of jurisdiction.

The plaintiff's motion to remand having been overruled when the case was called for trial, plaintiff refused to submit to the jurisdiction of the court below, and the court thereupon dismissed his suit and entered judgment against the plaintiff that he "take nothing by his suit in this behalf and that the defendants, National Enameling and Stamping Company, a corporation, Harry Schenck and George Wettengel, go hence without day and recover of the said plaintiff their costs and charges herein expended." (Trans., p. 20.)

The defendant Wettengel filed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and plaintiff sets forth in his specifications of error (trans. p. 23) the sustaining of this demurrer as error. Because of the fact that this is set forth as a specification of error, defendants contend that the jurisdictional question is not the sole question in issue, and that, therefore, this court has no jurisdiction.

It would seem that both of these contentions of defendants in error are conclusively settled against them by the case of Powers v. Chesapeake & Ohio Ry., 169 U. S. l. c. 95. In that case, just as in this, plaintiff in his suit for personal injuries had joined with a non-resident corporate defendant an individual defendant residing in the same State with himself. The case had been removed to the United States Circuit Court. Plaintiff had made a motion to remand, which motion was overruled. The court also sustained a demurrer to plaintiff's petition. When the case was called for trial, plaintiff refused to recognize the jurisdiction of the court or to offer any evidence. Judgment was rendered against him and the jurisdictional question was certified to this court. This court, in that case, entertained and passed upon the question as to whether or not the court below had jurisdiction. It seems to us that the case cited is absolutely parallel with the one at bar, and conclusively settles in our favor both points raised in the motion to dismiss.

The case of Colorado Eastern Ry. Co. v. Union Pacific Ry. Co., 94 Fed. 313, was a case in which the court below had dismissed the suit for failure to duly prosecute the same, and entered judgment for costs against the plaintiff in error. This judgment was appealed from. Defendant in error moved to dismiss on the ground that there had been no final judgment. The court held:

> "The motion must be denied. An order of dismissal for want of prosecution and judgment for costs against plaintiff is a final judgment from which an appeal will lie. (Citing authorities). To constitute a final judgment, it is not essential that it should be a bar to another suit."

The opinion was rendered by Judge Caldwell of the Circuit Court of Appeals for the Eighth Circuit, and was concurred in by Judge Sanborn and Judge Thayer.

In the case at bar, the judgment is even more clearly final than the one in the case last cited. The case at bar came on for trial. Plaintiff refused to recognize the jurisdiction of the court and introduced no testimony. Judgment was rendered against him and execution ordered in defendants' favor. There is no difference upon principle between a judgment so rendered where no evidence is offered by plaintiff and a judgment rendered agaist him where his evidence is insufficient.

The contention that this court can not entertain jurisdiction of this writ of error because there are other questions in issue than the question of the jurisdiction of the court below is clearly not well taken. In the first place, the demurrer of Wettengel was sustained by the court below on the ground that the complaint stated no cause of action against Wettengel. As the complaint undertook to state a cause of action against Wettengel and the National Enameling and Stamping Company, the jurisdiction of the United States Circuit Court depended upon the question as to whether or not the petition stated a cause of action against both Wettengel and the Stamping Company or a cause of action against the Stamping Company alone. At least, that was the theory upon which the court below decided the question as to its jurisdiction. In deciding that the petition states no cause of action against Wettengel, the court below reached a conclusion as a result of which it sustained its jurisdiction. Therefore, the jurisdictional question in this case is inseparably connected with the question as to whether or not the petition states a cause of action against Wettengel. Hence, in setting out the overruling of Wettengel's demurrer as a specification of error, plaintiff in error did not complain of the action of the court below upon any other matter than a jurisdictional question. The fifth specification of error, to the effect that the court erred in sustaining the demurrer of the defendant Wettengel, was not, as counsel for defendants state, omitted among the specifications of error set forth in our brief through mistake. It was purposely omitted, because it was regarded by counsel as a mere repetition of the third specification of error, which is that the court erred in holding that plaintiff's complaint herein discloses but one cause of acton, and that against the defendant corporation. (See trans. p. 23).

In the second place, even though other issues had been passed upon by the court below than those having reference to its jurisdiction, that fact would not affect the right and duty of this court to pass upon the question of the jurisdiction of the court below, because that question is clearly certified and is the only question which is certified by the court below to this court for its considertion. (See certificate, trans. p. 22).

Even if it were true that the assignment of errors specifies other action of the court below than its action on the jurisdictional question, that fact could not affect the right and duty of this court to pass on the jurisdictional question thus brought before it.

In the case of U. S. v. Jahn, 155 U. S. 109, other questions than the jurisdictional question were passed upon by the court below and its action upon other than such questions was assigned as error, because the jurisdictional question was not raised at all until the case reached the Circuit Court of Appeals. But the jurisdictional question was certified to this court and decided by it. In the recent case of Ala. Great Southern v. Thompson, 26 Sup. Ct. Rep. 161, it also appears that the action of the court below upon the entire case was appealed from and that the jurisdictional question alone was certified. It is true that the case at bar comes to this court under section 5 of the act of March 3d, 1891, while the two cases last cited were certified under section 6 of the act. But whether a case be brought to this court under the one section or the other, it is not the assignment of errors but the certificate which determines the jurisdictional question brought before this court for review. As already pointed out in U. S. v. Jahn it is not even necessary that the jurisdictional question appear in the assignment of errors.

Counsel for defendants in support of the motion to dismiss, cite the case of McLish v. Roth, 141 U. S. 661. It seems to us that the case is not at all in point. In that case, a demurrer to the jurisdiction of the United States Circuit Court had been overruled. Whereupon without any judgmeut having been entered in the case at all, defendant undertook to have this court pass upon the jurisdictional question. It was conceded that there had been no final judgment, and contended that under the statute no final judgment was necessary in order that this court might review the jurisdictional question. But it was held by this court that the jurisdictional question could not be determined by it until after final judgment.

Upon the foregoing authorities and reasoning, we conclude first, that the judgment appealed from is clearly a final judgment; second, that the assignment of errors specifies error upon no other than a jurisdictional question. But, even if the latter proposition were not true, it could make no difference here, because the certificate of the court below specifies the jurisdictional question and that alone.

Respectfully submitted,

EDWARD C. KEHR,
Attorney for Plaintiff in Error,
with him on the Brief,
RICHARD T. BROWNRIGG, AND
WILLIAM L. MASON.

(19,932.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

REPLY BRIEF OF PLAINTIFF IN ERROR.

POINTS AND AUTHORITIES.

I.

If the allegations of a removal petition, charging that a plaintiff was guilty of fraud in alleging a joint cause of action against a resident and a non-resident defendant, are traversed by a motion to remand, such fraud must be proven by the removal petitioner

independently of the allegations in the removal petition or of the affidavits filed in support thereof.

Alabama Great Southern Ry. v. Thompson, 26 Sup. Ct. Rep. 161, l. c. 164;
Louisville etc. Ry. Co. v. Wagelin, 132 U. S. 599;
Plymouth etc. Co. v. Amador, 118 U. S. 264, 270;
Landis v. Felton, 73 Fed., l. c. 313;
Foster on Federal Procedure, Sec. 284, p. 925;
Kelly v. Railway Co., 122 Fed. 286;
Ross v. Erie R. Co., 120 Fed. 703;
Dow v. Bradstreet et al., 46 Fed. 824;
Durkee v. Illinois Central R. R. Co., 98 Fed. 1;
Arrowsmith v. N. & D. Ry. Co., 57 Fed. 170;
Free v. Western Union Telegraph Co., 122 Fed. 309;
Kansas City Ry. Co. v. Daughtery, 138 U. S. 303.

II.

The complaint states a joint cause of action. But even if it could be held upon critical analysis thereof that it fails to do so, the complaint must nevertheless be regarded as joint for purposes of removal, inasmuch as the allegations of the complaint do not disclose such palpable want of joint liability as to justify an imputation of bad faith upon the plaintiff.

Alabama Gt. Southern Ry. Co. v. Thompson, 26 Sup. Ct. Rep. 161;
Steinhauser v. Spraul, 127 Mo. 541;
Prince v. Illinois Central Ry. Co., 98 Fed. Rep. 1;
O'Neil v. Young, 58 Mo. App. 628;
Harriman v. Stowe, 57 Mo. 93;
Davenport v. Southern Ry. Co., 124 Fed. 983;
Schaefer v. Union Brick Co., 128 Fed. 97.

ARGUMENT.

I.

Burden Upon the Removal Petitioner to Show Fraud Independently of the Averments of the Verified Removal Petition.

In our original brief, we pointed out that the affidavits filed by the removal petitioner in support of its petition do not charge the plaintiff with fraud or with knowledge of any facts from which an inference of fraud may be drawn. Counsel for defendants in their brief state that we "evidently overlooked the verified petition for removal," which, as they proceed to show, does charge fraud. We did not overlook that fact. It is perfectly apparent that the verified removal petition charges fraud. But those allegations of fraud are denied by the motion to remand. An issue is thus raised as to the truth of those allegations. Upon that issue, the burden of proof was upon the removal petitioner. In the attempt to sustain that issue, the removal petitioner in support of the allegations of its petition offered as proof nothing except certain affidavits, which affidavits, as we have already pointed out, do not even charge fraud. This court has so frequently and so recently stated it to be the law that a verified removal petition does not prove itself and that the allegations of fraud therein contained must be proven by the party making them, that we regard it as unnecessary to cite or discuss authorities with a view to showing that such is the law. Therefore, even if affidavits could be regarded as proof upon such an issue, inasmuch as the affidavits filed in support of the removal petition do not at all bear upon the issue of fraud, the removal petitioner has clearly failed to sustain that issue.

In our original brief, we also take the position that, even if the affidavits filed in support of the removal petition charged fraud, such affidavits can not be regarded as proof upon that issue. Counsel for defendants contend that inasmuch as we did not object to the competency of affidavits for that purpose and ourselves filed an affidavit in opposition to those filed by the removal petitioner, we are not now in position to object that such affidavits do not constitute proof. But it would seem to be clear that where the allegations of fraud contained in the removal petition are denied by the motion to remand; and both the removal petition and the

motion to remand are verified by affidavits, the effect is merely to raise an issue as to the existence of the fraud charged; an issue in which the burden is upon the removal petitioner; and, if the removal petitioner does not offer sufficient and competent evidence upon that issue, it is not sustained, whether the plaintiff, who has the negative of the issue, should offer no evidence at all or evidence which is incompetent.

Counsel for defendants in their brief have incorporated quotations from a number of Federal cases, which quotations taken apart from the facts in the cases cited appear upon casual examination to lend color to their contention that affidavits may be regarded as proof upon the issue of fraud raised by a motion to remand. However, if those cases cited and quoted from in the brief of counsel for defendants are examined, it will be found that not one of them tends in any degree to support the proposition that where *an issue is raised* as to the truth of the allegations of fraud contained in a removal petition, affidavits may be regarded as proof upon that issue. In support of their contention, counsel for defendants cite and quote from the case of Kelly v. Ry. Co., 122 Fed. Rep. 286, 289. The excerpt quoted from that case refers to affidavits as proof. However, the motion to remand in that case stated only two grounds; first, that the removal petition was filed out of time; second, that the plaintiff and two of the defendants were citizens of Missouri. The verified removal petition charged that the allegations of joint liability were fraudulent. Such charge was not denied by the motion to remand, nor was it in any other way put in issue by the plaintiff. Therefore, the allegations of the verified removal petition as to the existence of fraud not being denied by the plaintiff, and no issue being raised by the plaintiff on that point, stood admitted. The case, therefore, can not be regarded as any authority upon the proposition, that an affidavit may be regarded as proof, in a case where the allegations of fraud contained in the removal petition are denied by the motion to remand, as is true in the case at bar.

Likewise, the cases of Ross v. Erie Ry. Co., 120 Fed. 703; Dow v. Bradstreet Co., 46 Fed. 824; Arrowsmith v. N. & D. R. Co., 57 Fed. 170; and Free v. Western Union Telegraph Co., 122 Fed. Rep. 309, all of which are cited by counsel for the defendants upon the proposition that affidavits may be regarded as proof upon an issue of fraud raised upon a motion to remand, are all cases in which, like the Kelly case, *no issue of fraud was raised* by the motion to remand. They are all cases in which the allegations of fraud contained in the removal petition *were not in any manner denied by the plaintiff*.

The case of Durkee v. Illinois Central Ry. Co., 98 Fed. 1, a case

also cited by counsel for defendants in this connection, was a case in which the issue of fraud was raised by the motion to remand, and was heard and passed upon by the Federal Court, but it does not appear in that case that upon that issue affidavits were either offered or considered.

In the case of Gustafson v. Ry. Co., 128 Fed. 85, also cited by counsel for the defense in this connection, on p. 15 *et seq.* of their brief, it appears that the United States Circuit Court passed upon the issue of fraud raised by a removal petition and a motion to remand, but it expressly appears from the opinion that the court heard oral testimony upon that issue and does not appear that affidavits were either filed or considered.

In this connection, counsel for defendants also cite the case of Kansas City Ry. Co. v. Daughtery, 138 U. S. 303. In this case Daughtery, the plaintiff, brought his suit in the State Court. A petition for removal was filed by one of the defendants, in which it was stated that the plaintiff, Daughtery, was a citizen of the same state as the removal petitioner. The removal petition was not verified by affidavit. Daughtery filed an affidavit in which he traversed the allegations of the removal petition. The State Court undertook to pass upon the issue of fraud thus raised and retained jurisdiction of the case. This court held that an issue raised upon a removal petition should be passed upon by the United States Circuit Court, and that the State Court had no jurisdiction to pass upon such issue. This court further held that, as the petition for removal was untimely, the State Court was justified in retaining jurisdiction. The case then clearly fails to lend the slightest color of support to the proposition upon which it is cited, to wit, that an affidavit may be regarded as proof upon an issue of fraud raised by a motion to remand, denying allegations of fraud contained in a removal petition. Because no motion to remand was filed. The affidavit filed was not even filed in support of the removal petition. It was filed by the opposite party; and this court merely held that the removal petition and such affidavit made an issue, which issue, if the application for removal had been timely, should have been passed upon by the United States Court.

We may, therefore confidently re-affirm our position that upon the issue of fraud raised in this case by the verified removal petition and the motion to remand, the removal petitioner offered nothing in the way of proof except certain affidavits which do not charge fraud or in any way bear upon that issue; and that, even if the affidavits so filed charged fraud, there is no authority for the proposition that such affidavits may be regarded as proof.

II.

For Purposes of Removal the Complaint States a Joint Cause of Action.

We think that the authorities cited in our original brief sufficiently demonstrate that the complaint states a joint cause of action, not only for purposes of removal but for all purposes. However, as already pointed out, under the decisions of this court, and especially under its recent decision in Alabama Great Southern v. Thompson, 26 Supt. Ct. Rep. 161, it is not necessary that the complaint should measure up to any such standard. Certain Federal Courts have laid down the doctrine that where a plaintiff has charged joint liability against a resident and non-resident defendant in a suit brought in a State Court and the cause has been removed to a Federal Court, the Federal Court should examine the petition by its four corners and critically analyze the same, and, if peradventure, upon such analysis it may be held that the plaintiff has misconceived his cause of action and has charged a joint liability in a case where the facts alleged do not bear out the claim of joint liability, then it must be held that the cause is removable; and that the plaintiff has been guilty of a fraudulent attempt to defeat the jurisdiction of the Federal Court. But this court has repeatedly refused to approve such doctrine or to enter upon any such analysis of a complaint in which a joint liability is charged; and especially in the recent case of Alabama Great Southern v. Thompson, *supra*, has expressed its opinion on that subject in terms which it seems to us are so clear that they can not be misunderstood. Under the decision in that case, whatever the court which has final jurisdiction of a case in which joint liability is charged may decide from an analysis of the complaint as to the existence or non-existence of joint liability, the complaint must for purposes of removal be regarded as stating a joint liability, unless the allegations therein contained so palpably disclose a want of the same as to justify an imputation of bad faith upon the plaintiff.

Upon the question as to whether or not the complaint in this case discloses any such palpable want of joint liability, if no cases were cited and none were considered by this court except those cited by counsel for the defense, it would be absolutely clear that the complaint herein does not palpably disclose the non-existence of joint liability, and that upon a critical analysis of the complaint measured by the rules laid down in the cases cited by the defense, the question as to the existence or non-existence of joint liability is at least a doubtful one, is at least such a question as one may be permitted to raise without laying himself liable to the imputa-

tion of fraud; and we think that it may well be contended that even the defendants' cases tend to show that the complaint actualy sets forth a case of joint liability for all purposes whatsoever. Consider, for instance, the Missouri cases cited by the defense. Upon the proposition that the complaint in this case charges the servant Wettengel with mere nonfeasance, for which he is not at all liable to the plaintiff, much stress is laid upon the case of Steinhauser v. Spraul, 127 Mo. 541. In this case the defendant was the wife of the plaintiff's employer. The defendant directed the plaintiff to get some pigeons out of a loft. In attempting to get the pigeons, plaintiff made use of a ladder which it was charged was too long and for that reason not reasonably safe for the purpose and that, therefore, the defendant was guilty of negligence in directing plaintiff to get the pigeons. The ladder was not furnished by the defendant for that purpose. It was furnished by her husband, plaintiff's employer, and had often been used by the plaintiff for that purpose before. The ladder was sound and the danger incident to its use consisted rather in the manner of its use than in the appliance itself. It was held by a divided court that the defendant was not liable. One of the opinions delivered in the case, written by Judge Sherwood, bases the holding of non-liability upon three grounds:

1. The acts charged against the defendant amounted to nonfeasance.

2. The appliance was, under the circumstances, reasonably safe.

3. The danger, if any, incident to its use was patent and was, therefore, assumed as ordinarily incident to the employment.

The case was heard by seven judges of the Missouri Supreme Court; only one of these judges concurred with Judge Sherwood in the holding of non-liability upon the first ground stated. Two concurred in the result, but expressly based their concurrence upon the two latter grounds; three dissented. That part of Judge Sherwood's opinion which counsel for defendants quote as the opinion of the court, and which discusses the question as to whether or not defendant was guilty of misfeasance or of mere nonfeasance, *is not the opinion of the court;* it merely represents the views of two of the seven judges who sat upon the case. Furthermore, it will be noted that Judge Sherwood, in the sentence quoted by counsel for defense, on page 26 of their brief, and which is the last sentence of the first paragraph on that page, speaks of "aggressive and positive omission." The sentence containing these words is not, in the opinion, incorporated in the same paragraph with the excerpt from the opinion which immediately precedes it. Between the words, "But as a wrongdoer," and the words, beginning the following sentence, "of course, no

such aggressive and positive omission," which appear on page 26 of the brief of counsel for defendants, there occurs in the opinion about eight pages of discussion. Counsel do not in any way indicate this break in the quotation, but put in utterly disconnected parts of the opinion as if the matter was all contained in one paragraph. If that part of Judge Sherwood's opinion is read in this connection, it can be more readily understood as to what he means by the expression *"aggressive and positive omission."* It will be clear from a consideration of that discussion that by "aggressive and positive omission" the writer of the opinion meant a negligent omission by an agent or servant in the course of the performance of any task which the servant had undertaken under such circumstances that the omission was likely to prove injurious to third persons. From a consideration of the entire opinion, it is clear that the writer recognizes the law to be that in such a case a negligent omission is not mere nonfeasance but is the same in effect as a positive act and amounts to misfeasance. The principles of law announced, it seems to us, clearly support our position that, if, as alleged in the complaint, the defendant Wettengel was charged by the National Enameling and Stamping Company with the duty of planning the construction of this furnace structure, and actually entered upon the performance of that duty, and so negligently planned the construction of that structure that it was not a reasonably safe place for the plaintiff to work, if his negligence may be regarded as in any sense negligence of omission, the omission was under such circumstances that injury to some third person was likely to result and was, therefore, an act of misfeasance.

Counsel for the defense also cite and quote from the Missouri case of O'Neil v. Young, 58 Mo. App. 628. (Defendants' brief, p. 23.) In that case the plaintiff was injured by the breaking of an elevator rope. Suit was brought against the Company owning the elevator and against Young, its President, who directed the plaintiff to carry up a quantity of glass in the elevator, in the carrying of which the rope broke and plaintiff was injured. It was not charged in the complaint that Young was under any duty to inspect the rope. The recovery seems to have been sought against him on the ground that he was negligent in ordering the plaintiff to take up a load beyond the capacity of the elevator. Nevertheless, Judge Biggs, who wrote one of the three opinions delivered in the case, undertakes to discuss the question as to whether or not, if Young had been charged with such duty, and had negligently inspected the rope, he would be guilty of misfeasance or of nonfeasance. And Judge Biggs expresses the view that Young's negligence was mere nonfeasance for which he would not be liable. Judge Rombauer, who also wrote an opinion in the case, pays no attention to this

question. Judge Bond, the other of the three judges, who also wrote an opinion, takes a position exactly opposite to that taken by Judge Biggs, from whose opinion counsel for the defense quote in their brief. Judge Bond, l. c. 639, 640, says:

> "I also hold that, for lack of reasonable care in inspecting the elevator, John Young would be liable to the corporation of which he was general manager, but for going further and ordering plaintiff to use an elevator, whose unfit condition might have been known by ordinary diligence on the part of John Young, he became guilty of active negligence and was, therefore, jointly liable with the corporation for the injuries caused by obedience to his directions on the part of plaintiff. This is the rule announced by the supreme court. Steinhauser v. Spraul, 114 Mo. 551."

Upon this question of misfeasance and nonfeasance, counsel for defense also quote from the Missouri case of Harriman v. Stowe, 57 Mo. 93, a case in which the defendant, acting as agent of another, had negligently constructed a cellar door and as a result of which negligent construction, the plaintiff, passing over the door, fell and was injured. It was held that such negligence of defendant was not a mere omission for which defendant was responsible only to his employer, but the omission to make the door reasonably safe, which defendant had undertaken to construct, amounted to positive misfeasance, for which defendant was liable to a third person.

If the negligent omission to construct in a reasonably safe manner a door or hatchway is such an omission as amounts to misfeasance, how can it be contended that the negligent omission to construct with reasonable safety the furnace structure upon which plaintiff was employed was not also such an omission as amounted to misfeasance; and if the defendant Wettengel planned that furnace structure, upon what principle of law can it be held that he is not liable for the negligent manner in which that structure was made, if he would be liable for an omission to use due care in constructing a doorway, as a result of which omission some third person was injured?

Such are the Missouri cases cited in the brief for the defense upon the proposition that the acts charged against the defendant Wettengel in this case so clearly amount to mere nonfeasance that the plaintiff and his counsel must be held to be guilty of fraud in the making of such allegations. The extract quoted by counsel for defendants from the case of Steinhauser v. Spraul, *supra*, the one upon which they appear most to rely, is not the opinion of the court, but the opinion of only two out of the seven judges who sat upon the case, and even that part of the opinion which relates to

the subject of misfeasance and nonfeasance, when properly considered, does not tend to show that the act charged against the defendant Wettengel in this case is mere nonfeasance.

In the case of O'Neil v. Young, *supra*, another case relied upon, what is quoted as the opinion of the court is the opinion of only one of the three judges who sat upon the case, and is directly contrary to the opinion of another of the three.

The Missouri case of Harriman v. Stowe, is so far from supporting the defendants' contention that it would be difficult to find a stronger case in support of the proposition that the acts charged against the defendant Wettengel amount to misfeasance.

We consider it unnecessary to further prolong the discussion by an analysis of cases from other jurisdictions. It seems to us that there is really no ground for a serious contention that the allegations of the complaint in this case so clearly show want of joint liability as to justify the imputation that plaintiff and his counsel were guilty of fraud in attempting to hold the individual defendant and the defendant Company jointly liable.

Respectfully submitted,

EDWARD C. KEHR,

Attorney for Plaintiff in Error,

With him on the Brief,

RICHARD T. BROWNRIGG AND

WILLIAM L. MASON.

FILE COPY.

NOV 14 1906
JAMES H. McKENNEY,
CLERK.

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR

AND

BRIEF OF DEFENDANTS IN ERROR

IN SUPPORT OF SAID MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

CHARLES P. WISE,
GEORGE F. McNULTY,
JAMES A. SEDDON AND
ROBERT A. HOLLAND, Jr.,
Attorneys for Defendants in Error.

No. 133.

OCTOBER TERM, 1906.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

MOTION TO DISMISS WRIT OF ERROR

The defendants in error have filed in this Court a motion to dismiss the writ of error. Said motion to dismiss is as follows, caption omitted:

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR.

Now comes The National Enameling & Stamping Company and George Wettengel, defendants in error, in the above entitled cause, by their attorneys, and move this honorable Court to dismiss the writ of error sued out herein by Conrad Wecker, plaintiff in error.

For ground of their motion defendants in error assign that this Court has no jurisdiction to entertain said writ of error for the following reasons:

I.

Because no final judgment disposing of the entire case has been rendered in this cause. On the contrary a mere judgment of dismissal was entered (transcript of the record, page 20). The said judgment entered

against the plaintiff in error was not in invitum, but was entered practically at the request of the plaintiff in error. In other words, when the case was called for trial, and the plaintiff refused to proceed, there was nothing for the Court to do but to dismiss the cause. There was no judgment entered disposing of the cause, and no judgment which would prevent the plaintiff in error from filing a new suit either in the State Court for an amount less than Two Thousand Dollars, or in the Federal Court for a larger amount. In effect the plaintiff in error took a voluntary non-suit. No writ of error could properly be granted in the case until final judgment had been entered disposing of all the matters in issue.

II.

Because even had final judgment been entered disposing of the entire cause on the merits, this Court would have had no jurisdiction to entertain this writ of error, but a writ of error could only be entertained and passed upon by the United States Circuit Court of Appeals for the Eighth Judicial Circuit. See Act of March 3, 1891, Section Six. This writ of error does not fall within the provisions of Section 5 of said Act which provides that where the jurisdiction of the court alone is an issue, the question of jurisdiction is properly determined by this Court. Reference to the transcript of the record will show that the question of jurisdiction of the court is not the only question involved in this case. The trial Court not only overruled the motion of the plaintiff in error to remand the cause to the State Court, but also sustained the demurrer to the petition of the plaintiff in error filed by George Wettengel, one of the defendants in error. (Transcript of the record, page 20.) It also appears that sub-

sequently the plaintiff in error filed his assignments of error, one of which is as follows: "Fifth: The Court erred in sustaining the demurrer of the defendant, George Wettengel." (Transcript of the record, page 23.) It also appears that plaintiff in error, in his prayer for a writ of error, avers that certain errors were committed to his prejudice, and assigned that said errors appeared from the assignments of error theretofore filed. (Transcript of the record, pages 23 and 24.)

As the writ of error, therefore, was asked in order that the errors claimed in the assignments of error might be corrected, said writ of error was not sued out merely on the question of jurisdiction. Therefore, this Court has no jurisdiction to entertain or pass upon the writ of error in this cause.

Charles P. Wise,
George F. McNulty,
James A. Seddon, and
Robert A. Holland, Jr.

STATEMENT IN REFERENCE TO MOTION TO DISMISS WRIT OF ERROR.

This cause originated in a Circuit Court of the State of Missouri, the plaintiff in error having joined therein The National Enameling and Stamping Company, an Illinois corporation; Harry Schenk, a resident of Illinois, and George Wettengel, a resident of the State of Missouri. A petition to remove the cause was filed on the ground that the joinder of defendant George Wettengel was not made in good faith. (Transcript of Record, pages 7-10.) The cause was removed, and subsequently plaintiff in error filed a motion to remand. (Transcript of Record, page 14.) Affidavits were filed by the parties, and the Federal Court overruled the motion to remand. (Transcript of Record, pages 16-19). Subsequently the Federal Court sustained a demurrer to the petition filed by defendant George Wettengel. (Transcript of Record, page 20.) Thereafter the plaintiff in error filed assignments of error in which he specified that the Court erred in overruling the motion to remand, **and in sustaining the demurrer of defendant Wettengel.** (Transcript of Record, page 23.) Thereafter plaintiff in error filed a petition for a writ of error in which he averred that certain **errors** were committed to his prejudice, and stated that said errors appeared in the assignments of error. (Transcript of Record, pages 23 and 24.) When the case was called for trial, the plaintiff in error refused to proceed. Whereupon the Court dismissed the cause. (Transcript of Record, page 20.)

On the 26th day of April, 1905, the plaintiff in error secured from the District Judge a certificate to the effect that the only question decided by the Court con-

cerned the jurisdiction of the Court, but subsequently, on September 15th, 1905, plaintiff in error elected to file the assignments of error above mentioned in which he raised, in addition to the jurisdictional point, the question of correctness of the ruling of the Court in sustaining the demurrer filed by defendant Wettengel. (Transcript of Record, page 23.)

BRIEF OF THE ARGUMENT.

I.

The motion to dismiss this writ of error should be sustained—

(a) Because the writ of error was not sued out to review a final judgment.

McLish vs. Roffy, 141 U. S. 661.
U. S. vs. Evans, 5 Crauch 280.
Evans vs. Phillips, 4 Wheat 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 49 Fed. Rep. 481.

(b) Because the question of jurisdiction of the Federal Court is not the only question raised.

McLish vs. Roffy, 141 U. S. 661, 668.

ARGUMENT ON MOTION TO DISMISS.

The above motion is self-explanatory, and a citation of authorities in support thereof is hardly necessary.

The first ground of the motion is that the judgment rendered in this cause is not a judgment from which, under the federal practice, a writ of error lies. The fundamental principle governing such matters is that a party can never sue out a writ of error to review a judgment unless the judgment is final and is rendered against him in invitum. (McLish vs. Roff, 141 U. S., 661, 668.) The practice existing in certain code states allowing the plaintiff, upon an adverse ruling of any kind being made to take a non-suit with leave to subsequently appeal therefrom does not exist in the Federal Courts. **In this case the plaintiff in error in effect took a voluntary non-suit.** It is true that the Federal Court overruled the motion of plaintiff in error to remand, but this did not prevent the plaintiff in error from trying the case upon the merits. The order of the Court was not one denying its jurisdiction of the cause. If the Court had denied its jurisdiction, and had entered judgment on that account, such judgment would be in a proper sense a final judgment, and would be rendered in invitum. But the plaintiff in error in this case, in which the Court asserted its jurisdiction, was not entitled to stop at that stage and seek a review of the action of the Court, but it was incumbent upon him to allow the cause to proceed to trial upon the merits; and then, in the event that he lost, take an appeal from the final judgment. The federal practice does not contemplate that causes shall be tried piecemeal. **If the plaintiff in error should be successful in the present writ of error, there would be nothing to prevent him from filing another suit on the same**

cause of action either in the State Court or in the Federal Court. The judgment, therefore, dismissing the cause is not a final judgment and does not dispose of the cause. Moreover, it was a judgment that was entered in effect upon the invitation of the plaintiff in error. When the cause was called for trial, the plaintiff in error, instead of trying same, merely refused to proceed, and the Court did the only thing it could do under the circumstances, to-wit, dismissed the cause. But there was no final judgment rendered in favor of the defendants in error in the cause or against the plaintiff in error in the cause.

U. S. vs. Evans, 5 Crauch, 280.
Evans vs. Phillips, 4 Wheat, 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 149 Fed. Rep. 481.

(b) But even if final judgment had been entered in the cause, this Court would have no jurisdiction to entertain this writ of error because the plaintiff in error, in the writ of error, does not seek to review solely the action of the Court below in reference to the jurisdiction. Under Section Fifth of the Act of March 3, 1891, **this Court has jurisdiction only in cases where the question of jurisdiction alone is an issue.** This is not the case in the present writ of error. The demurrer filed by the defendant in error, Wettengel, was sustained by the Court (Transcript of the record, page 20). Subsequently the plaintiff in error filed an assignment of errors the fifth specification of which was as follows: **"Fifth. The Court erred in sustaining the demurrer of the defendant, George Wettengel."** Thereafter the plaintiff in error filed a petition for a

writ of error in which said petition the plaintiff in error assigned that in the proceedings in this cause "certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignments of error which is filed with this petition." (Transcript of the record, pages 23 and 24.)

It is true that on the 26th day of April, 1905, the plaintiff in error secured from the judge who tried this cause, Hon. Elmer B. Adams, a certificate to the effect that the only question decided by the Court in this cause concerned the jurisdiction of the Court. But subsequently the plaintiff in error evidently decided to raise another question, and as late as the 15th day of September, 1905, five months after filing the assignments of error above mentioned, filed a petition for a writ of error. (In this connection we call attention to a mistake made by counsel for plaintiff in error in their brief, on page 15. There, in setting out the specifications of error, they omit entirely the fifth specification above mentioned and give the sixth specification under the number fifth.) That this Court has jurisdiction only where the single question of jurisdiction of the Federal Court is an issue is definitely decided in McLish vs Roff, 141 U. S., 661, 668, where the Court says:

"The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken out after final judgment, except in the cases specified in Section 7 of the Act. **When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.**"

For the above reasons we respectfully submit that the writ of error herein should be dismissed.

Respectfully submitted,

CHARLES P. WISE,
GEORGE F. McNULTY,
JAMES A. SEDDON,
ROBERT A. HOLLAND, JR.,
Attorneys for Defendants in Error.

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FILED.
NOV 14 1906
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CLERK.

BRIEF OF DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING CO. AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

CHARLES P. WISE,
GEORGE F. McNULTY,
JAMES A. SEDDON AND
ROBERT A. HOLLAND, JR.,
Attorneys for Defendants in Error.

FILED OCTOBER 11, 1905.

(19,932.)

No. 133.

OCTOBER TERM, 1906.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING CO. AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

STATEMENT OF DEFENDANTS IN ERROR.

The defendants in error have filed in this Court a motion to dismiss the writ of error. Said motion to dismiss is as follows, caption and signatures being omitted.

"MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR.

Now comes The National Enameling & Stamping Company and George Wettengel, defendants in error, in the above entitled cause, by their attorneys, and move this honorable Court to dismiss the writ of error sued out herein by Conrad Wecker, plaintiff in error.

For ground of their motion defendants in error assign that this Court has no jurisdiction to entertain said writ of error for the following reasons:

I.

Because no final judgment disposing of the entire case has been rendered in this cause. On the contrary a mere judgment of dismissal was entered (transcript of the record, page 20). The said judgment entered against the plaintiff in error was not in invitum, but

was entered practically at the request of the plaintiff in error. In other words, when the case was called for trial, and the plaintiff refused to proceed, there was nothing for the Court to do but to dismiss the cause. There was no judgment entered disposing of the cause, and no judgment which would prevent the plaintiff in error from filing a new suit either in the State Court for an amount less than Two Thousand Dollars, or in the Federal Court for a larger amount. In effect the plaintiff in error took a voluntary non-suit. No writ of error could properly be granted in the case until final judgment had been entered disposing of all the matters in issue.

II.

Because even had final judgment been entered disposing of the entire cause on the merits, this Court would have had no jurisdiction to entertain this writ of error, but a writ of error could only be entertained and passed upon by the United States Circuit Court of Appeals for the Eighth Judicial Circuit. See Act of March 3, 1891, Section Six. This writ of error does not fall within the provisions of Section 5 of said Act which provides that where the jurisdiction of the court alone is an issue, the question of jurisdiction is properly determined by this Court. Reference to the transcript of the record will show that the question of jurisdiction of the court is not the only question involved in this case. The trial Court not only overruled the motion of the plaintiff in error to remand the cause to the State Court, but also sustained the demurrer to the petition of the plaintiff in error filed by George Wettengel, one of the defendants in error. (Transcript of the record, page 20.) It also appears that subsequently the plaintiff in error filed his assignments of

error, one of which is as follows: "Fifth: The Court erred in sustaining the demurrer of the defendant, George Wettengel." (Transcript of the record, page 23.) It also appears that plaintiff in error, in his prayer for a writ of error, avers that certain errors were committed to his prejudice, and assigned that said errors appeared from the assignments of error theretofore filed. (Transcript of the record, pages 23 and 24.)

As the writ of error, therefore, was asked in order that the errors claimed in the assignments of error might be corrected, said writ of error was not sued out merely on the question of jurisdiction. Therefore, this Court has no jurisdiction to entertain or pass upon the writ of error in this cause."

THE MERITS.

This is a case in which the plaintiff in error instituted a suit in a Missouri State Court against the National Enameling & Stamping Company (which, for the sake of convenience, will throughout this brief be called the Stamping Company), a citizen and resident of the State of Illinois. There was joined with said defendant in error one Harry Schenk on the statement that Harry Schenk was a resident of the State of Missouri. In the removal petition, it was averred, under oath, that Harry Schenk was not a resident of the State of Missouri, but was a resident of the State of Illinois. This matter was not controverted by the plaintiff in error, so as to Harry Schenk there is no controversy between the parties as to right of the Stamping Company to remove. The plaintiff in error joined one George Wettengel, a resident of the State of Missouri. The plaintiff in error sought to recover against the said Stamping Company on the ground that it negligently caused him to work near certain pots which were not provided with covers or rails, and that the said Company failed to provide reasonably safe and sufficient hoisting apparatus for elevating the mass of grease, and that said Company negligently gave the plaintiff such instructions as unreasonably endangered the plaintiff's safety. As to defendant, Wettengel, plaintiff alleged that the latter was employed by the Stamping Company and charged by said Company with the duty of superintending and properly planning the construction of said vats or pots and with the duty of providing reasonably safe and suitable covering or railing for same, and with the duty of providing a proper place and reasonably safe and sufficient hoisting apparatus for plaintiff's use,

and with the further duty of properly instructing the plaintiff as to the manner of perf ming his duty. That in spite thereof the said We engel negligently planned the construction of said po s and negligently failed to provide a sufficient hoisting apparatus for the plaintiff, and negligently gave the plaintiff such instructions as unreasonably endangered the safety of plaintiff. (Transcript of the record, pages 4 and 5.)

Thereafter the Stamping Company filed a removal petition **duly verified**, in which it averred that there was a separable controversy in this cause between it and the plaintiff in error. The said removal petition stated that the plaintiff's petition stated no cause of action against the defendant Wettengel, that said Wettengel was not at the time of the accident in question, or prior thereto, charged with the superintendence or oversight of the plaintiff or with the duty of superintending or properly planning the construction of said furnace structure into which the pots were set, and was not charged by the Stamping Company with the duty of providing for the pots reasonably safe and suitable covering, railing or other device to protect the plaintiff from slipping or falling into the same, and was not charged with the duty of properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use, and was not charged with the duty of properly instructing the plaintiff as to the manner of performing his duties. (Transcript of the record, page 9.) **The removal petition further stated that the said George Wettengel was improperly and fraudulently joined with the Stamping Company for the sole purpose of fraudulently and improperly preventing, or attempting to prevent, said Stamping Company from removing the said cause to**

the Federal Court: that the plaintiff well knew, at the time of the bringing of this suit, that the said Wettengel was in no manner charged with the performance of any of the duties which it is alleged he should have performed, and that said plaintiff well knew, at the time of the bringing of this suit, that said Wettengel was not in or about the place where said plaintiff was injured at the time of such injury; that he in no manner was in control or superintendent, and that it was not his duty to plan the construction of said furnace or provide any cover or railing or other devices in or about the said pots, or to provide a reasonably safe hoisting apparatus for plaintiff's use; but that the said plaintiff, with this knowledge, joined the said Wettengel herein solely to prevent the removal of this cause, and not in good faith. (Transcript of the record, page 10.)

Thereafter in the Federal Court the Stamping Company filed two affidavits. The first was that of George Eisenmayer, the chief engineer of the Stamping Company. In this affidavit said engineer stated that he was charged by the Stamping Company with the duty of seeing to the repairs of the apparatus and also planning any new apparatus that was about to be adopted; **that defendant Wettengel was employed in the office of the Stamping Company as a draftsman and his sole work was that of a draftsman and that he had nothing to do with selecting plans or approving plans, but that his sole work was to take the plans and ideas given to him, and to make the necessary drawings for the use of mechanics.** (Transcript of the record, page 17.) The second affidavit was that of defendant George Wettengel, in which he stated that at the time in question and for months previous thereto he

had no duties in the employment of the Stamping Company except to act as draftsman, and that all his work was done in the office of the company; that he had no work whatever outside of the office; was not thrown in contact with employes outside of the office and that he was charged with no duty whatever of superintending the apparatus; that he had no discretion whatever as to what apparatus should be used in defendant's plant, and particularly none in connection with the furnace pots complained of by the plaintiff. **In brief, said Wettengel stated in said affidavit that his position was a clerical one and his duties were limited to the actual making of drawings to enable the mechanics to do the construction work upon the basis of plans adopted by other persons in the employ of defendant;** that Wettengel did not even know the plaintiff by name and did not know what sort of work he was doing, and did not know what part of the plant he was engaged in. (Transcript of the record, pages 18 and 19.)

In opposition to the verified petition of removal and of the two affidavits mentioned above, the only testimony adduced by the plaintiff in error was one affidavit of the plaintiff in error himself in which he states that one George Eisenmayer, prior and up to the time of the construction of the structure in question, was in the employ of the Stamping Company, and was charged with the general supervision of the work and business of said Company at the place in which plaintiff was employed and at which he received his injuires. **That just prior to the construction of the said furnace structure, plaintiff heard the said Eisenmayer direct the said defendant George Wettengel to prepare plans for a furnace structure to be erected upon the spot whereupon, or shortly afterwards, was erected the structure upon**

which the plaintiff was at work when he received the injuries set forth in his petition; that plaintiff, at the time he filed his petition herein, believed, and still believes, that the said defendant George Wettengel, plannd and directed the construction of said furnace structure as set forth in plaintiff's petition filed herein. (Transcript of the record, page 16.)

It appears, therefore, that the plaintiff in error nowhere contradicts the affidavits of the Stamping Company to the effect that Wettengel was entrusted with no duties of superintendence and had nothing to do with discharging the master's duty of furnishing a reasonably safe hoisting apparatus, or with giving the plaintiff in error any instructions. The only thing in the affidavits filed by the Stamping Company that the plaintiff in error contradicts is in reference to the planning of the furnace structure in question. In regard to that he no longer asserts that Wettengel was charged with the duty of superintendence, but states that Eisenmayer was so charged, and that on one occasion he heard Eisenmayer direct the defendant Wettengel to prepare plans for a furnace to be erected upon the spot where the plaintiff was injured. This in reality is not a contradiction at all, but is compatible with all of the affidavits filed by the Stamping Company to the effect that George Wettengel's work was exclusively that of a draftsman in the office, and that he executed detailed plans at the direction of superiors, said detailed drawings to be used by the mechanics. All the plaintiff in error, in said affidavit, avers is that on one occasion he heard Eisenmayer tell Wettengel to "prepare plans for a furnace structure." He does not even state that Wettengel made said plans or that the furnace was built in accordance therewith.

The Court below, after considering the complaint of plaintiff in error, the verified removal petition, and the affidavits above mentioned, reached the conclusion that the defendant Wettengel, a resident of Missouri, was joined as defendant not in good faith, but solely for the purpose of preventing the Stamping Company from removing the cause to the Federal Court. The grounds of the Court's action are clearly set forth in the opinion rendered by the District Judge on the motion to remand and on the motion in arrest of judgment. (See transcript of the record, pages 25, 26 and 27.) These opinions show that the Court reached the conclusion that the joinder of defendant Wettengel was not in good faith, first because the petition not only failed to state a cause of action against the defendant Wettengel, but affirmatively showed that no cause of action existed against said defendant, and secondly because the testimony introduced in the form of affidavits showed that the joinder was not made in good faith.

BRIEF OF THE ARGUMENT.

I.

The motion to dismiss this writ of error should be sustained—

(a) Because the writ of error was not sued out to review a final judgment.

McLish vs. Roffy, 141 U. S. 661.
U. S. vs. Evans, 5 Crauch 280.
Evans vs. Phillips, 4 Wheat 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 49 Fed. Rep. 481.

(b) Because the question of jurisdiction of the Federal Court is not the only question raised.

McLish vs. Roffy, 141 U. S. 661, 668.

II.

The Court below did not err in overruling the motion of plaintiff in error to remand the cause.

(a) Because there was a separable controversy as to defendant in error, Stamping Company, the joinder of defendant in error, Wittengel, not being in good faith.

Hartog vs. Memory, 116 U. S. 588, 591.
Farrell vs. O'Brien, 199 U. S. 89, 100.
Gustafson vs. Railway, 128 Fed. Rep. 85.
Ross vs. Erie Railway, 120 Fed. Rep. 703, 704.
Durkee vs. Railroad, 81 Fed. Rep. 1.
Boatner vs. Amer. Express Co., 122 Fed. Rep. 714.
Hukill vs. Maysville, 72 Fed. Rep. 745.
Alabama Railway vs. Thompson, 26 Sup. Ct. Rep. 161.

(b) The lack of good faith appeared on the face of the petition of plaintiff in error because said petition shows on its face that plaintiff in error never had a cause against the resident defendant.

Steinhauser vs. Spraul, 127 Mo. 541.
Carey vs. Rocherau, 16 Fed. Rep. 87.
Kelly vs. Railroad, 122 Fed. Rep. 286.
Prince vs. Ill. Central R., 98 Fed. Rep. 1.
Davenport vs. Railway, 124 Fed. Rep. 983.
Shaffer vs. Union Brick Co., 128 Fed. Rep. 97.
O'Neil vs. Young, 58 Mo. App. 628.
Harriman vs. Stowe, 57 Mo. 93.
Stone vs. Cartwright, 6 Durnford & East., 411 (Kings Bench).
Ferguson vs. Railway, 63 Fed. Rep. 177.

(c) Because the verified removal petition and the affidavits filed by the removing defendant abundantly show that the joinder of the resident defendant was wrongful, and for the sole purpose of attempting to prevent removal.

Kelly vs. Railway Co., 122 Fed. Rep. 286, 289.
Free vs. Western Union, 122 Fed. Rep. 309, 313.
Kansas City Ry. vs. Daughtry, 138 U. S. 303.

ARGUMENT ON MOTION TO DISMISS.

The above motion is self-explanatory, and a citation of authorities in support thereof is hardly necessary.

The first ground of the motion is that the judgment rendered in this cause is not a judgment from which, under the federal practice, a writ of error lies. The fundamental principle governing such matters is that a party can never sue out a writ of error to review a judgment unless the judgment is final and is rendered against him in invitum. (McLish vs. Roff, 141 U. S., 661, 668.) The practice existing in certain code states allowing the plaintiff, upon an adverse ruling of any kind being made to take a non-suit with leave to subsequently appeal therefrom does not exist in the Federal Courts. **In this case the plaintiff in error in effect took a voluntary non-suit.** It is true that the Federal Court overruled the motion of plaintiff in error to remand, but this did not prevent the plaintiff in error from trying the case upon the merits. The order of the Court was not one denying its jurisdiction of the cause. If the Court had denied its jurisdiction, and had entered judgment on that account, such judgment would be in a proper sense a final judgment, and would be rendered in invitum. But the plaintiff in error in this case, in which the Court asserted its jurisdiction, was not entitled to stop at that stage and seek a review of the action of the Court, but it was incumbent upon him to allow the cause to proceed to trial upon the merits; and then, in the event that he lost, take an appeal from the final judgment. The federal practice does not contemplate that causes shall be tried piecemeal. **If the plaintiff in error should be successful in the present writ of error, there would be nothing to prevent him from filing another suit on the same**

cause of action either in the State Court or in the Federal Court. The judgment, therefore, dismissing the cause is not a final judgment and does not dispose of the cause. Moreover, it was a judgment that was entered in effect upon the invitation of the plaintiff in error. When the cause was called for trial, the plaintiff in error, instead of trying same, merely refused to proceed, and the Court did the only thing it could do under the circumstances, to-wit, dismissed the cause. But there was no final judgment rendered in favor of the defendants in error in the cause or against the plaintiff in error in the cause.

U. S. vs. Evans, 5 Crauch, 280.
Evans vs. Phillips, 4 Wheat, 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 149 Fed. Rep. 481.

(b) But even if final judgment had been entered in the cause, this Court would have no jurisdiction to entertain this writ of error because the plaintiff in error, in the writ of error, does not seek to review solely the action of the Court below in reference to the jurisdiction. Under Section Fifth of the Act of March 3, 1891, **this Court has jurisdiction only in cases where the question of jurisdiction alone is an issue.** This is not the case in the present writ of error. The demurrer filed by the defendant in error, Wettengel, was sustained by the Court (Transcript of the record, page 20). Subsequently the plaintiff in error filed an assignment of errors the fifth specification of which was as follows: **"Fifth. The Court erred in sustaining the demurrer of the defendant, George Wettengel."** Thereafter the plaintiff in error filed a petition for a

writ of error in which said petition the plaintiff in error assigned that in the proceedings in this cause "certain **errors** were committed to the prejudice of this plaintiff, all of which will more in detail **appear** from the assignments of error which is filed with this petition." (Transcript of the record, pages 23 and 24.)

It is true that on the 26th day of April, 1905, the plaintiff in error secured from the judge who tried this cause, Hon. Elmer B. Adams, a certificate to the effect that the only question decided by the Court in this cause concerned the jurisdiction of the Court. But subsequently the plaintiff in error evidently decided to raise another question, and as late as the 15th day of September, 1905, five months after filing the assignments of error above mentioned, filed a petition for a writ of error. (In this connection we call attention to a mistake made by counsel for plaintiff in error in their brief, on page 15. There, in setting out the specifications of error, they omit entirely the fifth specification above mentioned and give the sixth specification under the number fifth.) That this Court has jurisdiction only where the single question of jurisdiction of the Federal Court is an issue is definitely decided in McLish vs Roff, 141 U. S., 661, 668, where the Court says:

"The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken out after final judgment, except in the cases specified in Section 7 of the Act. **When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.**"

ARGUMENT ON THE MERITS.

We think it is clear that the Court below did not err in refusing to remand the cause to the State Court on the ground that there was a separable controversy between the plaintiff in error and the Stamping Company, and that the joinder of defendant Wettengel was not made in good faith, but was made solely for the purpose of attempting to avoid removal.

I.

(a) It is well settled that where the joinder of resident defendants is not made in good faith, such joinder will not prevent a removal. In Louisville R. Co. vs. Wangelin, 132 U. S. 599, the Court, after laying down the general rule that the question of separable controversy is determined by the averments of the comlpaint, makes the following qualification: "unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In Gustafson vs. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 85, the court, in announcing the above rule, says: "Since the publication of the decision in the Dixon case, the practice of attorneys in personal injury cases, in joining a local resident defendant, like an engineer, brakeman, or other employe, with the non-resident railroad company, to prevent the removal by the railroad company from the State to the United States court, is becoming so universal as to invite the courts to closest scrutiny to see whether, in fact and law, there actually exists a joint cause of action, or merely a simulated one. While the policy of the judiciary act of 1887-88 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St.

1901, p. 508]) was rather to restrict than enlarge the jurisdiction of United States courts, it is just as applicable today as it ever was what Judge Lurton in Arrowsmith vs. Nashville & D. R. Co. (C. C.), 57 Fed. 169, quotes from the language of Mr. Justice Miller, that:

> 'It would be a very dangerous doctrine — one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. **We must threfeore be astute not to permit devices to become successful which are used for the very purpose of destroying that right.'**

"If this growing practice be further extended, under a latitudinarian construction, beyond what was really decided in the Dixon Case, and those in consonance therewith, the practical result is to be a denial to non-resident corporations of the right of removal from the local to the federal courts. The persistent insistence of attorneys for such plaintiffs is that just in so much as, by mere allegation in the petition, a joint cause of action can be apparently stated, regardless of the motive of the pleader and the underlying facts, they may effectually cut off even a technical analysis of the petition, to see whether in point of law a joint cause of action is stated, and any resort to evidence in pais on the issue of removal and remand. But the right and the duty of the court are well recognized to examine the petition by its "four corners," to see if a joint cause of action is stated; for, no matter how designedly and repetitiously the pleader may assert that 'the de-

fendants' did so and so, such assertions will be treated as a mere brutum fulmen, if, taking the facts as a whole stated in the petition, they disclose, in contemplation of law, a separable cause of action against the defendants. As held by the Supreme Court of this State, the allegation of negligence on the part of the defendants in general terms is treated as mere surplusage—words without meaning—when preceded or followed by specific allegations of specific acts of negligence. Fuchs vs. City of St. Louis, 167 Mo. 620, 640, 67 S. W. 610, 57 L. R. A. 136; Chitty vs. Railway, 148 Mo. 64-75, 49 S. W. 868; McCarty vs. Hotel Co., 144 Mo. 397, 402, 46 S. W. 172.

"And as already stated, even where the petition on its face alleges a joint cause of action, or some joint acts of the defendants, the non-resident defendant may challenge the truth of it in his petition for removal by alleging that it was inserted for the purpose of preventing the exercise of the right of removal by the non-resident defendant, and this issue of fact is to be determined by the United States court. And if any material fact alleged in the petition, for the purpose of showing a joint cause of action, be found to be untrue in fact, and such fact was known to the pleader, or could have been known to him by the exercise of that inquiry which the law exacts, the court is warranted in drawing the conclusion, as a matter of law, that the purpose was to prevent the right of removal by the non-resident defendant. Union Terminal Railway Co. vs. Chicago, B. & Q. R. R. Co. (C. C.), 119 Fed., loc. cit. 213."

See also Ross vs. Erie R. Co., 120 Fed. Rep. 703, 704; Durkee vs. R. Co., 81 Fed. Rep. 1; Boatner vs. Amer. Express Co., 122 Fed. Rep. 714; Hukill vs. Maysville

& B. T. R. Co., 72 Fed. Rep. 745; Hartog vs. Memory, 116 U. S. 588, 591; Farrell vs. O'Brien, 199 U. S. 89, 100.

Counsel cite the recent case of Railway vs. Thompson, 26 Sup. Ct. Rep., page 161, but that case merely holds that there is no separable controversy when defendants are properly joined in good faith. In the case of Chesapeake & Ohio Ry. Co. vs. Dixon, 179 U. S. 131, much relied upon by counsel, the Court, in denying the right of removal, calls special attention to the fact that "the petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof."

(b) The petition of plaintiff in error not only fails to state a cause of action against the defendant Wettengel, but shows affirmatively that the plaintiff in error had no cause of action against said defendant. It is true in one place the petition alleges joint negligence, but the plaintiff in error goes on to specify both the negligence of the Stamping Company, and the supposed negligence of Wettengel. The said specifications of negligence are failures to perform duties personal to the master in reference to furnishing a reasonably safe place to work and giving sufficient instructions. The petition alleges that the Stamping Company failed in this connection, and then goes on to state that the defendant Wettengel was charged with the duty of superintendency and failed, in connection with said duties of superintendence, to fulfill certain duties that were personal to the master. There is no charge that the defendant, Wettengel, did any positive act or was guilty of any misfeasance such as running a train too rapidly, or putting too much power on an engine or improperly handling a hoisting apparatus, in short no charge that defendant Wettengel as a member of society violated

any duty which he as a member of society owed the plaintiff in error. On the contrary, the averment is merely that the master was charged with certain personal duties in reference to furnishing the plaintiff in error a reasonably safe place to work, that the master delegated the discharge of these duties to defendant, Wettengel, and that defendant, Wettengel, failed in the performance thereof. **But they were all duties that defendant Wettengel did not and could not owe to plaintiff in error, and for a violation of which Wettengel was not and could not be liable to plaintiff in error.** Under these circumstances, the Court below rightly held that the petition did not state a cause of action against defendant, Wettengel.

The general rule well established throughout this country is that an agent is only liable for acts of misfeasance, and is not liable for acts of nonfeasance. In other words, an agent is responsible to his principal alone for failure to carry out his duty as agent, but is not responsible to third persons for such failure. But if the agent, in the course of his work, commits any acts of misfeasance which result in injury to third persons, he is liable therefor. This liability, however, arises not from the fact that he is acting as agent of another, but merely because, as a member of human society, he owes a duty to other members of human society not to injure them by his carelessness or recklessness. If the law were different, it would impose great hardships upon servants. In this case the master was charged with the duty of furnishing a reasonably safe furnace. A superintendent is not charged with that duty even to his master, unless he is instructed by his master to make the furnace safe. If the master commands his superintendent to construct a furnace in an unsafe way, it is the duty of

the latter to obey, and he discharges his entire duty as the agent if he follows the instructions of his master. In such case would it not be a gross injustice to hold the superintendent liable for failure to furnish a reasonably safe furnace, when he furnished one in exact compliance with his instructions! As agent, such a superintendent is in privity with his principal alone, and as agent he discharges his entire duty if he obeys the orders of his principal. And even though he fail to discharge any of the duties of his agency, he would be liable for such failure to his principal alone. This rule is well stated in the case of Steinhauser vs. Spraul, 127 Mo. 541.

> **"A servant or deputy quantenus, such, cannot be charged for it, but for misfeasance an action will lie against the servant or deputy, but not quantenus a deputy or servant, but as a wrongdoer."**

The rule is also well expressed in the case of Carey vs. Rocherau, 16 Federal Reporter 87, where the Court says:

> **"It is very doubtful if an agent per se is liable to a third person on any account. A person acting as an agent for another is liable for his own misfeasance, but it results not from the agency, but in spite of it."**

A very excellent discussion of this principle is to be found in the case of Kelly vs. Railroad, 122 Federal Reporter, page 286. There an employe of a railroad company charged with the duty of inspection was joined with the railroad company in an effort to prevent removal. The Court held that the petition stated no cause of action against the employe, and for this and the further reason that the joinder of the employe was not in good faith remanded the cause. In this case the plain-

tiff sought to state a cause of action against employe Strauss on the ground that he was the yardmaster in the employ of the railroad company and that he neglected to perform his duty, in that he failed to make an inspection of an engine, that by reason of his negligence in not making the inspection the engine was not capable of standing the pressure of steam required to pull the train of cars in question, and that an explosion ensued.

The Court says:

> "Under the allegations of this petition, Strause was a mere servant of the railway company, charged with the duty of inspecting the engines of the company before they were suffered to go out of the defendant's yards at Slater, Mo. **His failure to do this was simply an act of omission or nonfeasance, and nothing more. I understand the law to be that the agent or servant is personally liable to third parties for doing something—committing a positive act—which he ought not to have done, but not for doing something that he ought to have done.** In the latter case he is liable only to his employer. Ewell's Evans on Agency, p. 438. Story on Agency (9th Ed.), 308, 309, in discussing this question, said:
>
> " 'We come, in the next place, to the consideration of the liability of agents to third persons in regard to torts or wrongs done by them in the course of their agency. And here the distinction ordinarily taken is between acts of misfeasance or positive wrongs, and nonfeasance, or mere omissions of duty, by private agents. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent; leaving him to his

remedy over against the agent in all cases where the tort is of such a nature as that he is entitled to compensation. The agent is also personally liable to third persons for his own misfeasances and positive wrongs. **But he is not liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal. And hence the general maxim as to all such negligences and omissions of duty is, in cases of private agency, respondeat superior.** The distinction, thus propounded, between misfeasance and nonfeasance, between acts of direct, positive wrong, and mere neglects by agents as to their personal liability therefor, may seem nice and artificial and partakes perhaps not a little of the subtlety and over-refinement of the old doctrines of the common law. It seems, however, to be founded upon this ground; that no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses, for no man can authorize another to do a positive wrong. **But in respect to nonfeasance or mere neglects in the performance of duty the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation, except those to whom he has become bound or amenable for his conduct.''**

In Prince vs. Illinois Central, 98 Federal Reporter 1, the plaintiff sought to state a cause of action against certain employes of the railroad as follows: While coupling cars his foot was caught in a frog because the frog was open and not properly blocked or plugged. He averred that the failure to block or plug the frog was the result of the negligence alike of the railroad company and of two of its employes, one a section boss

and the other a yardmaster. The Court in that case decided that the petition stated no cause of action against said employes, also that the petition with the testimony taken together showed that the joinder of the employes was clearly for the fraudulent purpose of preventing removal. In that case the Court ably discusses the question of the liability of an agent to third persons for failure to discharge duties imposed upon him by his principal.

> "The same cases also seem to make clear the proposition that there was no such privity of contract or of relation or otherwise between the plaintiff and either Carroll or Smith as to make either of them liable in either event to the plaintiff for the injury. They were the employes of the railroad company. **They owed no duty to the plaintiff under the circumstances of this case, whatever may have been their obligations to the railroad company; and while their superior, the common employe of all the parties, may be responsible to the plaintiff, it by no means follows that Carroll or Smith is in any way liable.** Evidently it is a case where the master, if any one, must respond for the damage instead of the servant."

The case of O'Neil vs. Young, 58 M. A. 628, is identical in principle with this. There it was sought to hold an agent responsible for the defective condition of a hoist. The suit was brought by a person injured by a falling hoist against the corporation that owned and operated the hoist, and also against an individual who was acting as foreman at the time. The ground of the suit was negligence in allowing a rope connected with the hoist to become weak and defective. The Court says, in reference to the liability of the individual, page 635:

"**It is only where the agent is guilty of active negligence, that is, of some act of misfeasance, that he can be made to answer to third parties.** Harriman vs. Stowe, 57 Mo. 98; Lottman vs. Barnett, 62 Mo. 159; Steinhauser vs. Straul, 114 Mo. 551. * * * **If the inspection made by Young was carelessly done, then at most he was guilty of nonfeasance or omission of duty for which his company alone could not be held.** This placed the plaintiff's right of recovery, if any he had, on the neglect of the defendant company to have the elevator properly inspected and kept in repair. **If these duties devolved on Young as manager of the company, and he neglected them, they were only acts of nonfeasance on his part.**"

In the case of Harriman vs. Stowe, 57 Mo. 93, the question arose as to the liability of an agent who negligently repaired a trap door and negligently left the same in an unsafe condition. In this case the Court says, page 98:

"'Judge Story says the distinction ordinarily taken, is between acts of misfeasance, or positive wrong, and nonfeasance, or mere omission of duty by private agents. The law on this subject as to principals and agents, is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servants, in all cases within the scope of his employment. So the principal in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature that he is entitled to compensation. **The agent is personally liable to third persons for his own misfeasance and positive wrongs, but he is not in general liable to third persons for his own**

nonfeasances or omissions of duty, in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons; and the privity existing only between him and his principal. Therefore, the general maxim as to all such negligence and omissions of duty is, in cases of private agency, respondeat superior.'

"The true distinction, as stated by Story, is between acts of misfeasance, or positive wrongs, and nonfeasance, or mere omissions of duty. In the latter case, the master or principal is alone liable to third persons; whilst in the former, the responsibility rests upon both principal and agent."

The Court then goes on to point out that the act of the servant in constructing a trap door, and in leaving it there, so as to hurt pedestrians was not an act of nonfeasance, but was an act of misfeasance or positive wrong, and that the agent was held liable not because as agent he owed any duty to the plaintiff, but because as a member of society he was under obligation not to set such a dangerous trap for his fellowman.

Perhaps the most carefully considered case on this subject is that of Steinhauser vs. Spraul, 127 Mo. 541. There a woman was sued for negligence in furnishing an insufficient ladder to a domestic who was in the employ of the said woman's husband. The effort was made to hold the wife of the employer on the ground that she, as agent, was also liable. The Court says, page 552:

"In a very early case, Chief Justice Holt clearly drew the distinction between the nonliability of a person to a third party because of negligence, or nonfeasance, and misfeasance, or positive wrong, saying: 'It was objected at the bar that they have this remedy against Breese. I agree, if they could

prove that he took the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant, and then his neglect is only chargeable on his master, or principal; **for a servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer.** Of course, no such aggressive and positive omission can be laid at the door of defendant, and consequently no such liability as springs from an omission of that sort.

"**There are cases where a servant is liable to his fellow servant for negligence resulting in injuries to the latter; but it is believed it will be found upon examination that no such liability attaches except where some physical act is done by the servant, and results to the damage of his fellow, or where the servant occupies an independent plane, and his orders to his fellow servants are equivalent in force, effect and resultant injury to a physical act, as in Bell vs. Josselyn, supra.**"

The same doctrine is very clearly laid down in the case of Stone vs. Cartwright, 6 Durnford & East, 411 (King's Bench). In that case a certain party owned and operated a colliery. The owner's agent was sued for negligence in the operation of the same that resulted in injury to adjoining property. In his opinion Lord Kenyon used the following language:

"There is no pretense whatever for imputing liability to the defendant in this cause. **It might as well be contended that a similar action would lie against the steward of another for all the defaults or improper conduct of the men under him by which any other received damage. In all these**

cases I have ever understood that an action must ever be brought against the one committing the injury or against the owner for whom the work is done, but it is never heard of that a servant who hires laborers for his master was answerable for all of their acts." In the same opinion Grose uses the following language: "It frequently happens that a person's gardener employs laborers under him, yet it could never be contended that on that account he would be answerable for damage done by them in the course of their employment."

In Davenport vs. Southern Railway Company, 124 Federal Reporter 983, the Court says:

> "The Southern Railway Company is responsible to third persons for negligence of its agents, but for negligence merely these agents are not responsible to third persons. Ewell's Evans on Agency, 438. Negligence is negative in its character. It is the omission to perform some duty. Milwaukee Etc. Rd. vs. Arms, 91 U. S. 489, 23 L. Ed. 374. It implies nonfeasance, and is contradistinguished from misfeasance. To make the agent responsible to third persons, there must be some positive act or wrong on his part. The whole doctrine is clearly stated in Story on Agency (9th Ed.), Paragraphs 308-309."

In Shaffer vs. Union Brick Co., 128 Federal Reporter 97, the Court says:

> "A servant may or may not be liable depending upon the nature of the act performed. For example, a servant may wholly fail to perform any of the duties imposed upon him by the master. Injury resulting to third persons from such failure, the master will be responsible to the injured person. The servant will not be liable to such third person, but to the master only. In such case there is no joint liability because the master alone is liable."

In Ferguson vs. Railway Co., 63 Fed. Rep. 177, the plaintiff sought to recover against the company and two of its employes. There the Court says: "It is clear in the present case that the plaintiff counts upon the legal duty of the railway company to furnish for the use of its servants machinery and appliances properly constructed and equipped, and avers as a breach of this legal duty that the engine was not built for switching purposes, and was not properly equipped with railings, catch-rods, etc. If the company fell short of its duty in this respect, and the plaintiff suffered injury by reason thereof, then a right of action existed in favor of plaintiff, based upon the cause named, to-wit: the failure of the master, in the performance of its duty, to furnish proper machinery and appliances for the use of its employes. **The petition does not, nor could it rightfully, charge the engineer or yardmaster with this duty, and with a consequence of the breach thereof.** These men were but co-servants with the plaintiff, and were under no legal obligation to furnish any machinery for his use. It is certainly clear that if the plaintiff had sued the engineer or yardmaster alone, and had based his action upon the averment that the engine was not properly equipped, he could not recover, because it could not be shown that they were under any legal obligation to furnish a safely equipped engine for his use. **That was the obligation of the master, and not of the servant.**"

In the Dixon Case cited by counsel, suit was brought against a railroad company and two employes, and the averment was that the deceased, while crossing a railroad track, was run over and instantly killed by the negligence of the company, committed through its engineer and fireman. The negligence is not specified, and

it is impossible to determine, from the petition, whether the acts of the engineer and fireman were acts of nonfeasance or misfeasance. This case, therefore, has no bearing on the question at issue here.

(c) We have stated above the first ground upon which the Court below based its decision that defendant Wettengel was joined for the fraudulent purpose of preventing removal, to-wit: on the ground that the petition showed on its face that there was no couse of action against defendant, Wettengel. We come now to the second ground upon which the Court based its conclusion, to-wit: the testimony introduced in the case by the parties. We have already referred to this testimony above, giving an outline of the verified removal petition and of the affidavits. We showed that the verified petition for removal set out in detail that the defendant Wettengel had no duties whatever of superintendence, and that he had nothing to do with planning the construction of the structure mentioned in the evidence, but that his sole duties were as draftsman in the office making detailed drawings for mechanics; that plaintiff well knew all this at the time he filed his petition and that defendant Wettengel was joined for the fraudulent purpose of preventing removal. We also showed that the affidavits of Eisenmayer and Wettengel fully sustained the statements of the removal petition to the effect that Wettengel had no duties whatever as an employe of the Stamping Company except to make detailed drawings for mechanics, and that he had no duties whatever of superintendence. Finally we called attention to the fact that the only testimony introduced by the plaintiff in error was the affidavit of the plaintiff in error himself, in which he admits that Eisenmayer was charged with the general superintend-

ence of the work and business of the Stamping Company and merely states that on one occasion he heard Eisenmayer direct Wettengel to prepare plans for a furnace. In other words, three affidavits were introduced by the Stamping Company showing that Wettengel had no work whatever for the Stamping Company except as draftsman in the office of the Stamping Company, and these affidavits were in no way contradicted by the plaintiff in error. In his single affidavit, he does not state that Wettengel had any duties of superintendence, any duty to see to it that the place where he was required to work was reasonably safe, but alleges solely that he once heard Eisenmayer, the superintendent, direct him to prepare plans for a furnace. He does not state whether Wettengel was to determine what sort of furnace should be introduced, but merely states that he was to prepare the plans. This is entirely in harmony with the affidavits introduced by the Stamping Company that he made plans for mechanics under the direction of his superiors, and there is nothing in the affidavit to the effect that Wettengel did in fact make the plans for this furnace at which the plaintiff in error claims to have been injured. So we believe the Court was amply warranted in finding, on the ground of the testimony alone, that the plaintiff in error did not act in good faith when he joined Wettengel as a party defendant.

Counsel state in their brief, page 29, that the affidavits referred to by the court do not state that the plaintiff in error or his counsel knew that any of the allegations complained of were false, or that any of the allegations complained of were not made in good faith with the expectation of proving them. Counsel evidently overlooked the verified petition for removal, which reads as follows: "Said plaintiff well knew at

the time of the bringing of this suit, that said Wettengel was in no manner charged with the performance of any of the duties which it is alleged he should have performed in said petition, and the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was not in or about the place where the said plaintiff was injured, at the time of the said injury; that he in no manner was in control or superintendent; that it was not his duty to plan the construction of the said furnace or to provide any covering, railing or other device in or about the said pots or to provide reasonably safe and sufficient hoisting apparatus for plaintiff's use, but that the said plaintiff, with this knowledge, joined the said Wettengel herein solely to prevent the removal of this cause and not in good faith."

Counsel in their brief contend that the charge of fraud in this case cannot be properly established by affidavit, and that there is no authority for such procedure. The objection of counsel is untimely. When the affidavits were filed by the defendant in error, no objection was made thereto and no exception made to their use. On the contrary, after they were filed, the plaintiff in error filed one in support of his contention. He not only thereby conceded the right to the filing of the affidavits by the Stamping Company and to the use of them by the court, but actually filed one himself and presented it to the court for consideration. He therefore is not in a position to complain of the kind of testimony upon which the question was submitted to the court. But, apart from the above considerations, the authorities abundantly establish that the question of good faith is properly determinable upon affidavit.

In Kelly vs. Railway Co., 122 Federal Rep. 286-289, the court says:

"Even where the petition stating the cause of action on its face presents a joint liability between a resident and non-resident defendant, it may nevertheless be shown in the petition for removal that no cause of action exists against the resident defendant and that his joinder as a co-defendant was for the purpose of defeating the removal of the cause, **and that where this allegation of the petition for removal is supported by proofs, as by affidavits, it devolves upon the plaintiff to take issue upon this fact, which issue shall be tried in the United States court, and if the plaintiff fail to controvert such petition and affidavit, the allegations of the petition for removal stand admitted.** Ross vs. Erie R. Co. et al. (C. C.), 120 Fed. 703; Dow vs. Bradstreet Company et al. (C. C.), 46 Fed. 824, 827, 828; Durkee vs. Illinois Central Railroad Company (C.C.), 98 Fed. 1; Arrowsmith vs. N. & D. R. Co. (C. C.), 57 Fed. 170."

In Free vs. Western Union Telegraph Co., 122 Fed. Rep. 309, 313, it was held that an unverified complaint that resident operators of a non-resident telegraph company were jointly liable with two operators for the delay in delivering a message, was insufficient to prevent a removal where the verified petition for removal was supported by the affidavits of such operators, that neither of them was on duty nor had anything to do with either receiving or delaying the message. The court says:

"But, aside from all that, what do we have? On the one side, the unsupported allegations of the petition, not verified, are to the effect that all three defendants are jointly liable, and that because Mullen and Neely were the operators who received and delayed delivering the message. **On the other side, we have the verified petition for removal, supported by the affidavits of both Mullen and Neely, that they and neither of them**

were on duty; had nothing to do with either receiving or delaying the message; that the only message received from Ida Whittier was addressed, not to the plaintiff, but to another party; and that message was received by an operator by the name of Colver. If the removal of this case can be prevented, then a little bit of display of the imagination set forth in a petition unsupported by any kind of proof can render nugatory the entire act of Congress upon the subject."

This controversy is conclusively settled by the case of Kansas City Railroad vs. Daughtry, 138 U. S. 303. There in an unverified petition the plaintiff claimed that the defendant was a non-resident. The defendant filed a petition for removal in which, under oath, he stated that he was a non-resident. There the court says:

> **"It is true the petition is not verified, contrary to good practice, but Daughtry's affidavit was explicit, so that if the record had been filed in the Circuit Court, the cause would, as it then stood, have been remanded. But this would not justify the State court in acting upon the facts, though it arrived at the same result."**

For the above reasons, we are of the opinion that the court has no jurisdiction to entertain this writ of error. If, however, the court decides this point adversely to us, we respectfully submit that the lower court did not err in overruling the motion of plaintiff in error to remand this cause, and in rendering a judgment of dismissal against the plaintiff in error when the latter, on call of the case, refused to prosecute the same.

Respectfully submitted,

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Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 133.—October Term, 1906.

Conrad Wecker, Plaintiff in Error, *vs.* The National Enameling and Stamping Company and George Wettengel, Defendants in Error.	In error to the Circuit Court of the United States for the Eastern District of Missouri.

[January 7, 1907.]

Mr. Justice Day delivered the opinion of the Court.

This case is certified here from the Circuit Court of the United States for the Eastern District of Missouri under section 5 of the Court of Appeals Act of March 3, 1891, (26 Stat. 827,) upon a question of jurisdiction.

Conrad Wecker, the plaintiff below, brought his action in the Circuit Court of the city of St. Louis, State of Missouri, against the National Enameling and Stamping Company, Harry Schenck and George Wettengel, undertaking to recover jointly against the National Enameling and Stamping Company, a corporation of the State of New Jersey, and Schenck and Wettengel, residents of the city of St. Louis, State of Missouri. The substance of the complaint is that defendant is a corporation employing the plaintiff in the work of firing, filling, stirring, emptying and attending certain metal pots used in the melting of grease and lubricant matter in the plant of the defendant corporation; that the grease and lubricant matter was delivered by the corporation to the plaintiff in barrels of great weight—about six hundred pounds each—and it was the plaintiff's duty in the course of his employment to hoist the same to the top surface of the furnace structure, into which the pots were set, and then to dump the grease and lubricant matter into the pots.

The neglience charged against the defendant corporation consisted in allowing the pots, which were constantly filled with hot and boiling lubricants, to remain open and exposed, without covering, railing, device or means of any character to protect the plaintiff from accidentally slipping or falling into the same while engaged in the service of the corporation in the performance of his duties, and negligently failing to provide and properly place safe and sufficient hoisting apparatus for the use of the plaintiff in his employment in lifting said masses of grease and lubricant to the top of the furnace, and for failing to give the plaintiff instructions as to the proper manner of performing his duty and thereby unreasonably

endangering his safety in said employment. Plaintiff alleges that, by reason of this negligence, while engaged in the performance of his duties on the 12th of November, 1902, on the top of the furnace, he lost his balance and fell into one of the open, unguarded and unprotected pots containing hot and boiling grease and lubricant, receiving thereby great and painful injuries. Plaintiff below further charged that Schenck and Wettengel were employed by the corporation and charged by it with the superintendence and oversight of the plaintiff in the performance of his duty and were employed and charged by the corporation with the duty of superintending and properly planning the construction of a furnace, and with the duty of providing for said pots reasonably safe and suitable covering, railing or other device, and with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for lifting the masses of grease and lubricant to the top of the furnace, and were further charged by the corporation with the duty of instructing the plaintiff as to the manner of performing his duties, and charges negligence of Schenck and Wettengel in planning and directing the construction of the furnace structure and providing suitable covers or railings as aforesaid, and providing and placing reasonably safe and sufficient hoisting apparatus and in giving instructions as to the manner of performing plaintiff's duties, by reason whereof the plaintiff lost his balance and fell into one of the pots as aforesaid, to his great injury, and the complaint charges the joint negligence of the corporation and the defendants Schenck and Wettengel, and avers that his injuries were the result thereof, and prays judgment for damages jointly against the three defendants.

The defendant company filed its petition for a removal of the cause to the Circuit Court of the United Sates for the Eastern District of Missouri, which petition contained the usual averments as to the character of the suit and the right of removal and diversity of citizenship between the defendant corporation and the plaintiff, and averred that Schenck, one of the co-defendants, was also a non-resident of the State of Missouri and a citizen of the State of Illinois, and not served with process; also stated that Wettengel was, at the time of the commencement of the suit and since, a citizen of the State of Missouri; averred a separable controversy between it and the plaintiff as to the alleged negligence and as to the assumption of the risk upon the part of the plaintiff. As to Wettengel, the citizen of Missouri, it was alleged in the removal petition that he was not, at the time of the accident or prior thereto, charged with the superintendence and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the furnace, or providing a reasonably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged with the duty of placing reasonably safe and sufficient hoist-

ing apparatus, nor with the duty of instructing the petitioner in respect to his duties, as charged in the complaint, and, after stating that Schenck, like the defendant corporation, was a non-resident of Missouri and a citizen of another State, charged that Wettengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that the plaintiff well knew, at the time of the beginning of the suit, that Wettengel was not charged with the duties aforesaid, and that he was joined as a party defendant to prevent the removal of the cause and not in good faith.

After removal, plaintiff filed his motion to remand the case to the State court, on the ground that there was not in the case a controversy between citizens of different States and no separable controversy between the plaintiff and the company within the meaning of the removal act. The court, upon hearing the motion, refused to remand the cause, and afterward, plaintiff electing to stand upon his motion to remand, and refusing to recognize the jurisdiction of the United States court or to proceed with the prosecution of his case therein, upon motion of the defendant the court ordered the case to be dismissed, and rendered judgment that the plaintiff take nothing by the suit, and that the defendants go hence without day and recover their costs against the plaintiff. A bill of exceptions was allowed, and the court also certified that the only question decided by the court in the cause was that the joining of Wettengel as a co-defendant with the company was palpably groundless and fictitious, and for the purpose of unlawfully depriving the defendant company of its right to remove the cause to the Federal court for trial; that for this reason the motion to remand was denied; that in deciding the motion the court took into consideration not only the complaint and petition for removal, but also the affidavits filed in support and opposition to the motion to remand; that the plaintiff refused to submit to the jurisdiction of the court and suffered a dismissal of the suit for the want of prosecution; that the question is whether the court had jurisdiction of the action.

In the first ruling upon the motion to remand, the court, in a written opinion, based its refusal upon the ground that the petition of plaintiff clearly showed that there was no joint cause of action against the company and the defendant Wettengel. Subsequently, the judge filed an opinion, in which he said that in his former opinion he made no allusion to the affidavits tending to show the fictitious and fraudulent joining of Wettengel, and that, in his opinion, the same inevitably showed that the inferences drawn from the allegations of the petition were correct, and that he might properly consider these affidavits in determining the question of removal.

It is urged by counsel for ~~plaintiff~~ defendant in error that the writ of error should be dismissed, because there was no final judgment, and only in a case where a final judgment has been rendered can the question of jurisdiction be certified from a Circuit Court under section 5 of the Court of Appeals act. *McLish* v. *Roff*, (141 U. S. 661,) is relied upon, in which it was held that a writ of error could only be taken out after final judgment.

It is true that, after the Circuit Court of the United States maintained its jurisdiction, the plaintiff could have gone on and tried the case on its merits, and, after judgment, had there been reason for doing so, taken the case to the Circuit Court of Appeals; but, upon refusing to recognize the jurisdiction of the Circuit Court, final judgment in the action was rendered, that the plaintiff take nothing by the suit and that the defendants go hence without day, and recover their costs against the plaintiff. Whether this judgment would be a bar to another action is not now before us; it is final, so far as the case is concerned, and terminated the action.

Section 5 of the Court of Appeals act provides that only the question of jurisdiction shall be brought to this court from the Circuit Court, and that is all that is now before us.

It is contended that this case should have been remanded upon the authority of *Alabama Great Southern Railway Co.* v. *Thompson*, (200 U. S. 206,) decided at the last term of this court. In that case it was held that, upon a question of removal, where a plaintiff, in good faith, prosecuted his suit as upon a joint cause of action, and the removal was sought when the complaint was the only pleading in the case, the action as therein stated was the test of removability, and if that was joint in character, and there was no showing of a want of good faith of the plaintiff, no separable controversy was presented with a non-resident defendant, joined with a citizen of the State; in other words, if the plaintiff had, in good faith, elected to make a joint cause of action, the question of proper joinder is not to be tried in the removal proceedings, and that, however that might turn out upon the merits, for the purpose of removal the case must be held to be that which the plaintiff has stated in setting forth his cause of action. And in that case it was said:

"The fact that by answer the defendant may show that the liability is several can not change the character of the case made by the plaintiff in his pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders which are shown, by the petition for removal or otherwise, to be attempts to sue in the State courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals."

And it was further stated in the court's opinion that there was nothing in that case to suggest an attempt to commit a fraud upon the jurisdiction of the Federal court.

Much discussion is had in this case as to whether the alleged cause of action is joint or several in its character, and whether the corporation and Wettengel could be jointly held responsible to the plaintiff upon the allegations of the complaint, but we do not deem it necessary to determine that question.

Upon the authority of the Alabama Great Southern case, *supra*, and the preceding cases in this court which are cited and applied in the opinion in that case, if the complaint is filed in good faith, the cause of action, for the purposes of removal, may be deemed to be that which the plaintiff has undertaken to make it, but in this case both parties filed affidavits upon the motion to remand, for and against the right to remove.

The petition for removal was sworn to by an agent of the company, and defendant corporation filed the affidavit of one George Eisenmayer, who testified that he was the chief engineer of the company, charged with the planning of new apparatus and the construction and repair thereof for the company, and that Wettengel was employed in the office as a draftsman, with several other persons in a similar capacity; that the sole work of Wettengel was as such draftsman, and that he had nothing to do with selecting plans or approving the same, but took the plans and ideas furnished him and made the necessary drawings for the use of mechanics, and that he had no authority to employ or discharge men or superintend work or give instructions to any of the men as to how they should perform their work. Wettengel's affidavit was also filed, in which he stated that for ten years he had been employed as a draftsman by the defendant company; that his work was performed in the office of the company; that he had no duties outside of the office or with the plaintiff; that he had no duty of superintendence in connection with him; that he was not charged with any duty of planning or constructing the apparatus which was used in the defendant's plant; that the designing and selection thereof was made by other persons, and that his sole duty was to attend to the mechanical work of drafting, based upon the ideas and plans of others; that he had no discretion whatever as to the sort of apparatus to be used in any part of defendant's plant, nor as to the structures mentioned in plaintiff's petition; that he had nothing to do with the planning of the pots, no right to determine what they should be, or whether a railing should be used, nor what sort of hoisting apparatus should be used in connection therewith; that he had no duty in connection with the plaintiff as to how or when he should do his work, and no authority to give him instructions; in short, that his position was merely clerical and his duties confined to the making of drawings to enable mechanics to construct work

from plans furnished by others in the employ of the defendant, and that he did not know the plaintiff by name, and did not know what sort of work he was doing or in what portion of defendant's plant he was engaged.

To these affidavits Wecker, the plaintiff, filed a counter affidavit, admitting that Eisenmayer was charged with the general supervision of the work and business of the company at the place plaintiff was employed and received his injury, and stating that just prior to the construction of the furnace structure he heard Eisenmayer direct Wettengel to prepare plans for a furnace to be erected where the one was built shortly after, upon which the plaintiff was at work when he received his injuries, and states his belief that the defendant Wettengel planned and directed the construction of the furnace.

Upon these affidavits the court reached the conclusion that, considered with the complaint, they showed conclusively an attempt to defeat the jurisdiction of the Federal court by wrongfully joining Wettengel.

The consideration of these affidavits clearly shows that Wettengel's employment was not that of a superior or superintendent, or one charged with furnishing designs, for it is not contradicted that he was employed as a draftsman, receiving his instructions from others, nor is there the slightest attempt to sustain the allegations of the petition that Wettengel was a superintendent over the plaintiff, or had any authority to direct his work or to give him instructions as to the manner in which his duty should be performed. The testimony certainly shows no basis for these charges. The affidavit of Wecker, except as to the statement of his belief, admits that Eisenmayer was superintendent, and claims that he heard him direct Wettengel to prepare plans for a furnace structure. This is not inconsistent with the undisputed testimony as to the nature and character of Wettengel's employment in the subordinate capacity of a draftsman.

In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court.

It is objected that there was no proof that Wecker knew of Wettengel's true relation to the defendant, and consequently he could not be guilty of fraud in joining him, but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach.

It is further objected that the court should not have heard the matter upon affidavits, and should have required testimony with the privilege to cross-examine, but the plaintiff made no objection to the consideration of affidavits in support of the petition for the removal and himself filed a counter affidavit. In this state of the record there certainly can be no

valid objection to the manner in which the court heard and considered the testimony.

While the plaintiff, in good faith, may proceed in the State courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction.

Reaching the conclusion that the court did not err in holding upon the testimony in this case that the real purpose in joining Wettengel was to prevent the exercise of the right of removal by the non-resident defendant, we affirm the action of the Circuit Court in refusing to remand the case.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.